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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

BARBARA ZAMLEN, et. al.,

Petitioners,

v.

CITY OF CLEVELAND, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Seventh Amendment rights are abrogated when a court grants a motion for directed verdict as to a claim of discrimination brought under 42 U.S.C. § 1983 at the conclusion of plaintiffs' case in chief although plaintiffs have presented statistical evidence showing gross disparities as well as other anecdotal evidence sufficient to state a prima facie case of discrimination?

2. Whether a defendant in a Title VII disparate impact case has failed to meet its burden of production when plaintiffs have effectively discredited the evidence of job-relatedness presented by the defendant?

3. Whether a physical examination for entry-level firefighters which tests primarily for abilities that, according to the tester's own job analysis, are not required, and which causes the most severe disparate impact possible upon women applicants, violates Title VII?

LIST OF PARTIES

Petitioners are Barbara Zamlen, Charlene Cuffari, Sharon Pirosko, Leana Adkins, Jennifer Garrucio, Diane Horne, Concetta Zingale, Denise Campbell and the class they represent, i.e., all women who unsuccessfully applied for entry-level firefighter positions with the City of Cleveland in 1983.

Respondents are the City of Cleveland; George Voinovich, Mayor; Reginald Turner, Director, Department of Public Safety; Thomas Skulina, President, Civil Service Commission; Edmund J. Turk, Vice-President, Civil Service Commission; Irene M. Morrow, Secretary, Civil Service Commission; Nancy Oliver and Solomon Harge, Civil Service Commission members; Karl Schneider, Personnel Administrator, Civil Service Commission; James McNamee, Fire Chief for the City.

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PETITION FOR A WRIT OF CERTIORARI
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The petitioners, Barbara Zamlen, et al., respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, on rehearing, dated July 30, 1990, has not been officially reported and is reprinted at pp. 1A-2A of the Appendix to this Petition.

The opinion of the United States Court of Appeals for the Sixth Circuit, dated June 11, 1990 is reported at 906 F.2d 209 (6th Circuit 1990), and is reprinted at pp. 3A-22A of the Appendix to this Petition.

The Opinion of the United States District Court for the Northern District of Ohio, dated May 27, 1988, is reported at 686 F.Supp 631 (N.D. Ohio 1988), and is reprinted beginning at p. 23A of the Appendix to this Petition.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion on June 11, 1990, affirming the decision of the United States District Court for the Northern District of Ohio. On July 30, 1990, the United States Court of Appeals for the Sixth Circuit denied petitioner's timely petition on rehearing en banc.

Petitioners' Motion for Application for Extension of Time to File for a Writ of Certiorari was granted by Justice Stevens of this Court on October 22, 1990.

The jurisdiction of this Court to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit is invoked under 28 U.S.C. §1254(1) (1982).

STATUTES INVOLVED

This case involves 42 U.S.C. §1983, which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This case also involves 42 U.S.C. §§2000e-2, which provides in relevant part:

> a. It shall be an unlawful employment practice for an employer --
>
> 1) to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges

> of employment because of such individual's race, color, religion, sex, or national origin; or
>
> 2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

As of 1983, Respondent, City of Cleveland (hereinafter "City"), had never hired a female firefighter. That year Petitioners, Barbara Zamlen, Charlene Cuffari, Sharon Pirosko, Leana Adkins, Jennifer Garrucio, Concetta Zingale, Diane Horne and Denise Campbell applied for and were tested for positions as entry-level firefighters. None of the Petitioners

received scores high enough to place them in a position on the eligibility list from which they could realistically expect to be hired. Nor did any other woman. Thus, absent this litigation, based on the results of its 1983 entry-level examination for firefighters, the City would have maintained its Fire Department as an exclusively male enclave.

To design, administer and score its 1983 firefighter examination, the City hired Dr. Norman Henderson, the same person who had been in charge of the City's firefighter examinations in 1977 and 1980 and its examination for Emergency Medical Technicians in 1983. Not one woman had been hired as a result of those examinations.[1]

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[1]In fact, all twelve of the women who took the 1983 emergency medical technician exam designed by Dr. Henderson had failed because of a particular event on the test.

The results of the 1983 firefighter examination were consistent with this pattern: of the 1,927 males who began the testing process, 1,069 made it to the eligibility list. Of the 285 females who were tested, only 29 received passing scores placing them on the eligibility list. More importantly, the City ranked applicants according to their test scores, and the highest ranking woman on the list was at position 334. Because of the limited number of openings to be filled, it was virtually impossible for any woman to be hired under the City's top-down selection system. Thus, the result of the City's selection system was that the number of females who would be hired as firefighters would again be zero.

On June 14, 1983, Petitioners filed this class action. The action was brought on behalf of the named petitioners and the

class consisting of all women who unsuccessfully applied for positions as entry-level firefighters for the City in 1983. Petitioners asserted that both the physical and written sections of the 1983 examination had an adverse impact on female applicants in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, et. seq. Petitioners also raised claims under 42 U.S.C. §1983, alleging violations of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution, and pendent state law claims.

The United States Government filed a second, similar suit alleging a pattern and practice of discrimination against women by the City in the hiring of firefighters. The Government challenged both the 1980 and 1983 physical agility examinations for firefighters. The two cases

were consolidated for trial. The primary defense raised by the City in both cases was the job-relatedness of the selection procedure.

On December 21, 1983, the District Court granted a preliminary injunction prohibiting the City from any further hiring off the 1983 eligibility list until further order of the Court. On January 2, 1985, the City filed a Motion for Limited Relief from the Preliminary Injunction. Based upon an agreement between the class plaintiffs and the City and subject to stipulated conditions, the Court issued an Interim Order dissolving the Preliminary Injunction. As part of this settlement, the City hired ten women from the eligibility list as firefighters.

By order January 30, 1986, a class was certified of all women who sought positions with the City as entry-level

firefighters from 1983 to the date of the order as well as all females who would apply for that position in the future.

Trial of the consolidated cases began April 6, 1987. The §1985 claim was dismissed prior to trial.[2] The claims of the class Plaintiffs under §1983 and common law were tried to a jury. The Title VII claims of both the class plaintiffs and the Government were tried to the Court. The class plaintiffs' case in chief was combined with that of the Government.

Statistical evidence of the disparate impact on women applicants of the 1980 and 1983 Cleveland Firefighters examinations was introduced through the testimony of Martina Dusenberry, a mathematical statis-

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[2]During the trial, the class Plaintiffs voluntarily dismissed as Defendants the City officials in their individual capacities. Prior to trial, Dr. Norman Henderson, who was a named Defendant in the class action, was dismissed pursuant to the terms of a settlement with the class Plaintiffs.

tician in the Employment Litigation Section, Civil Rights Division, U.S. Department of Justice. Ms. Dusenberry did a number of statistical calculations regarding the 1983 firefighters examinations. She testified that the disparate impact upon women of the 1983 firefighter test was highly statistically significant with a standard deviation of 6.76. (TR 110) She also testified that the probability of only 29 females scoring high enough to place on the eligibility list were one in ten to the eleventh power, or one in ten billion.

In addition, Plaintiffs presented other evidence that the City intended the disparate impact, such as: the adoption of an Affirmative Action Plain without <u>any</u> goals for hiring women as firefighters despite a recognition of the gross disparity in the Fire Department; the hiring of

Dr. Henderson, whose previous tests had a severe disparate impact on women, as test designer; the addition of an event to the physical examination shortly before the test date despite - or, perhaps, because of - the knowledge of the disparate impact it would have on women; the failure to announce test-events in advance, contrary to previous practice. Another important item of evidence, that the women who had been hired as a result of the interim agreement in 1985 had been performing as firefighters quite well,[3] was excluded by the trial court.

Plaintiffs did not present all their evidence in the case in chief because much of their evidence consisted of expert testimony which would be used as rebuttal

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[3]Indeed, as the fire chief indicated, some were performing better than their male counterparts who had been ranked higher on the eligibility list.

evidence in the Title VII case being tried jointly with the Government.

At the end of Plaintiffs' case, the City moved for directed verdict as to all counts of the Complaint. The trial court, after hearing the argument, determined that it had discretion to ignore the Title VII three-tiered approach to proof in deciding a §1983 case, and could require for Plaintiff's prima facie case evidence beyond the gross statistical disparity demonstrated by Plaintiffs. The Court then ruled that Plaintiffs' evidence was insufficient to allow the jury to infer an intent to discriminate and dismissed Plaintiffs' §1983 claim.[4]

The City's motion was overruled as to the Title VII claims of both Petitioners and the Government and the trial proceeded

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[4]The court also dismissed Plaintiffs' common law fraud claim.

on those claims. The remainder of the trial was primarily devoted to testimony of expert witnesses concerning the validity of the City's test.

The trial concluded on May 18, 1987. The parties submitted proposed findings of fact and conclusions of law. On May 27, 1988, the District Court issued a Memorandum of Opinion and Findings of Fact and Conclusions of Law (hereinafter "Opinion") finding against both the Plaintiffs and against the Government. In its Opinion, the District Court relied on Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972) in holding the City to a lesser burden of showing the job-relatedness of its exam because of the public safety aspects of the job of firefighter. In addition, the court relied on Berkman v. City of New York, 812 F.2d 52 (2d Cir.), cert. denied, 108 S. Ct. 146 (1987)

("Berkman II"), where the court held that a city was not required to test candidates for firefighter positions for their aerobic capacity. The District Court held that the City of Cleveland's failure to measure the stamina of applicants did not negate the validity of the examination. The Court pronounced the examination to be valid according to the content, criterion and construct theories of validity.

Petitioners filed their Notice of Appeal on June 24, 1988. The United States filed a Notice of Appeal on July 27, 1988. The Government's appeal was dismissed as untimely by the Sixth Circuit Court of Appeals on October 26, 1988.

The Sixth Circuit affirmed the District Court on all points. While finding the exclusion of the testimony of female firefighters concerning their jobs and their performance to be improper, the

Court of Appeals held that the exclusion was not substantially prejudicial. On the directed verdict issue, the court held that Petitioners' statistical evidence was "at best, amorphous" and did not sufficiently demonstrate an intent to discriminate.

Regarding the Title VII claim, the Court of Appeals, following this Court's decision in Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 109 S. Ct. 2115 (1989), which had been issued subsequent to the District Court's decision, held that the City simply had a burden of production of evidence of job-relatedness, which was less than even the Spurlock doctrine required. The Court then held that the City had met this burden, relying heavily on Berkman.

Petitioners timely filed a Petition for Rehearing and Suggestion for Rehearing

En Banc on the issues of methods for proceeding in a Title VII disparate impact case and on the abrogation of Petitioners' Seventh Amendment rights by the directed verdict on the § 1983 claim. On July 20, 1990, the Sixth Circuit denied the petition for rehearing en banc.

Petitioners' application for extension of time within which to file a petition for writ of certiorari was granted by Justice Stevens on October 22, 1990.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S STANDARD FOR DETERMINING WHETHER PETITIONERS HAD MADE A PRIMA FACIE CASE IS CONTRARY TO THAT OF OTHER CIRCUITS AND HAS WORKED TO DENY PETITIONERS' SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY

The Sixth Circuit's interpretation of the evidence needed to make out a prima facie claim under 42 U.S.C. §1983 for intentional discrimination results in the deprivation of Seventh Amendment rights.

In Lytle v. Household Manufacturing, Inc., __ U.S. ___, 110 S. Ct. 1331 (1990), this Court held that the Seventh Amendment precludes according collateral-estoppel effect to a district court's determination of issues common to equitable and legal claims where the court had resolved the Title VII equitable claims after erroneously dismissing the §1983 legal claims. This Court, citing Curtis v. Loether, 415 U.S. 189, 196, 94 S.Ct. 1005, 1009 (1974), noted that when legal and equitable claims are joined in the same action, "the right to jury trial on the legal claim, including all issues common to both claims, remains intact." ___ U.S. at _____, 110 S. Ct. at 1335. This Court further noted that a new trial before a jury was "essential to vindicating Lytle's Seventh Amendment rights." _____ U.S. at ____, 110 S.

Ct. at 1337.[5]

In the instant case, Petitioners similarly lost their Seventh Amendment rights when the lower court decided that they had to present all evidence of intent in their prima facie §1983 case, despite the fact it also was being tried under Title VII in a consolidated case brought by the United States and despite the fact that the overwhelming statistical evidence presented by Petitioners was sufficient - especially in light of other evidence

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[5]Respondent in Lytle also argued that remand was unnecessary because the district court would have directed a verdict in favor of respondent on the 1981 claims even if they had been litigated before a jury. The Court did not find this argument compelling and noted that in considering a motion for a directed verdict, "the court does not weigh the evidence, but draws all factual inferences in favor of the nonmoving party." _____ U.S. at _____, 110 S. Ct. at 1338. Citing to Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), the Court quoted, "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."

presented - to make out a prima facie case of intentional discrimination.

The Sixth Circuit failed to acknowledge Lytle or the jury trial issue. In doing so, it refused to recognize the sanctity of this right. The right to a trial by jury is well-grounded in our nation's history and law and cannot be so summarily denied.

Petitioners established disparate impact through gross statistical disparities relying on applicant flow data as is typical in this sort of case. See, e.g., Berkman v. City of New York, 536 F.Supp. 177 (E.D.N.Y. 1982), affd., 705 F.2d 584 (2d Cir. 1983). The trial court did not criticize Petitioners' disparate impact statistics but required that Petitioners put on evidence beyond a prima facie

showing of substantial disparate impact.[6] Since some of the Petitioners' offer of proof of intent to discriminate under §1983 included rebuttal testimony to be offered by their experts, in requiring such evidence to be introduced as part of Petitioners' prima facie showing, the trial court would have Petitioners rebutting evidence the City had the burden of first producing according to traditional Title VII disparate impact analysis.

Petitioners were unfairly penalized

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[6] The Sixth Circuit misconstrued the reasoning of the District Court in granting the City's motion for a directed verdict as to the §1983 claim. The panel incorrectly assumed that the lower court granted the motion because Petitioners' evidence was insufficient to demonstrate intentional discrimination and that the lower court "concluded that the evidence presented was at best amorphous..." (Slip Op. at 10) However, nothing in the record or in the District Court's Opinion supports such an assumption and this characterization of the statistical proof amounted to a de novo finding of fact by the Court of Appeals. To the contrary, the lower Court found that the disparate impact of the City's firefighter examination was established.

by the trial court's view that they should ignore the accepted mode of proof of their Title VII claim - and that of the Government in this consolidated trial - and introduce that evidence outside its logical sequence. Petitioners should not have been forced to choose between compromising their and the Government's Title VII claims and dismissal of their §1983 claim when they had presented sufficient statistical and anecdotal evidence of intentional discrimination to make a prima facie case.

Precedent of this Court and other circuits clearly stands for the proposition that a prima facie showing under §1983 can be based solely on statistics. Moreover, the fact that the City had never hired a woman as a firefighter prior to this lawsuit and would not have based on the 1983 firefighter examination adds up

to the "inexorable zero" sufficient to support an intentional discrimination claim. International Brotherhood of Teamsters v. United States, 431 U.S. 324, n.23 (1977).

This Court has held that statistical evidence alone may show a discriminatory purpose if the disparity demonstrated is so gross as to lead to an inference of discrimination. Hazelwood School District v. United States, 433 U.S. 299 (1977); International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); Castaneda v. Partida, 430 U.S. 482 (1977).

The District Court seemed to ignore this precept and simply held Petitioners evidence insufficient without explaining the basis for this conclusion. The Sixth Circuit acknowledged the possibility that statistical evidence can show discriminatory purpose but did not explain why it

deemed the blatant disparity presented by the figures in this case to be insufficient. By casually declaring Plaintiffs' evidence to be "amorphous" the Sixth Circuit has rubber-stamped the district court's precipitous denial of Plaintiffs' rights under the Seventh Amendment.

The trial court's insistence on additional evidence is in stark contrast to the approach of other circuits. For instance, in Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), the court held that as long as plaintiffs' statistical evidence is focused on the proper labor pool and is statistically significant, anecdotal evidence is not required. 738 F.2d at 1278.

While the statistics must be sufficiently strong to support an inference of intent, Carmichael v. Birmingham Saw Works, 738 F.2d 1126 (11th Cir. 1984);

James v. Stockham Valves & Fittings Co., 559 F.2d 310 (1977), cert. denied, 434 U.S. 1034 (1978); they need not be gross or overwhelming. Segar v. Smith, 738 F.2d at 1279. For instance, a sample size that was quite small compared to the numbers presented in this case was deemed sufficiently probative by the Tenth Circuit in McAlester v. United Air Lines, Inc., 851 F.2d 1249 (10th Cir. 1988).

The Seventh Circuit has likewise found evidence of intent in statistical disparities substantially less than or similar to that presented by Petitioners in this case. See, Babrocky v. Jewel Food Co., 773 F.2d 857 (7th Cir. 1985) (thirty-one meat cutters all male, fifteen meat wrappers all female); Mister v. Illinois Central Gulf R.R. Co., 832 F.2d 1427, cert. denied, 108 S. Ct. 1597 (1987) (not one of 150 black applicants hired)

In the latter case, Plaintiffs' expert testified that the probability of the disparity being the result of chance was one in a million. 832 F.2d at 1429. The court stated that "[i]t is hard to imagine a stronger case, short of an announcement of discrimination." Ibid. This action, with its disparity probability of one in ten billion, may be that case. Yet, the lower courts inexplicably held that petitioners had not presented a prima facie case.

The question of whether there is a minimum threshold of statistical significance mandating a finding of a prima facie case was recently addressed in Ottaviani v. SUNY, 875 F.2d 365 (1989), cert. denied, 110 S.Ct. 721 (1990). The court there declined to find such a mandate in the case of a statistical disparity of two

standard deviations.[7]

This Court, if it grants the writ, need not set a minimum threshold. What is needed, however, is an indication to the lower courts that a disparity as significant as that presented in this case, with a standard deviation of 6.76 cannot simply be ignored when to do so denies Seventh Amendment rights.

The evidence before the District Court established the severe and substantial disparate impact of the 1983 examination. (JA 52S-534). The question raised by the lower courts' dismissal of statistical evidence of this magnitude is: if the odds that gender was not a factor in the pass rate of the 1983 exam are one in ten

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[7]The court's pronouncement on this point was unnecessary to the determination of the case since a full trial of the merits was held and the question of whether a prima facie case had been established was rendered moot. 875 F.2d at 373.

billion, yet this statistic is deemed "insufficient," what statistical showing will ever be deemed sufficient for a §1983 prima facie case?

To hold the statistical showing in this case insufficient to state a prima facie case is effectively to hold that a trial court has complete discretion to make its own determination as to the ultimate factual question and to impinge upon the province of the jury in contravention of the Seventh Amendment.

II. IN AFFIRMING THE DISTRICT COURT'S PERFUNCTORY APPROVAL OF THE CITY'S FIREFIGHTER SELECTION PROCEDURE THE SIXTH CIRCUIT MISAPPLIED THE INSTRUCTIONS OF THIS COURT IN WARDS COVE PACKING CO., INC. V. ATONIO

A. Guidance From This Court Is Needed As To The Proper Standard To Apply To Determine Whether A Title VII Defendant In A Disparate Impact Case Has Met Its Burden Of Production Of Evidence Of Job-Relatedness And Whether Such Evidence Has Been Rebutted

This Court's decision in Wards Cove Packing Co., Inc, v. Atonio, 490 U.S. 642, 109 U.S. 2115 (1989) was issued while this case was on appeal. As the Sixth Circuit correctly pointed out, it is now clear that pursuant to Atonio, in a normal disparate impact case the burden of production only, not of proof, shifts to the defendant once the plaintiff has presented a prima facie case of discrimination.[8] Prior to Wards Cove many courts had held that the burden of proof switched to defendants.[9] Thus, for many courts the approach to the evidence of job-relatedness has changed and the degree of scrutiny to be applied to a defendant's evidence needs to be further delineated.

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[8]Thus, as the Sixth Circuit indicated, the doctrine announced in Spurlock v. United Airline, Inc., 475 F.2d 216 (10th Cir. 1972), whatever its merits, is no longer applicable.

[9]See, e.g., Wards Cove, 462 U.S. at ____, 109 S. Ct. at 2130 n.14 (dissenting opinion).

This case presents an opportunity for this Court to address the question of how the evidence presented by a defendant to satisfy its burden of production is to be analyzed. In Wards Cove, this Court clearly indicated that the mere act of producing some evidence to justify a practice that has a disparate impact does not end the case. A "reasoned review" of the employer's justification for the procedure causing the diparate impact should take place. 109 S. Ct. at 2126. The Court cautioned against allowing too low a standard of review. Ibid. It would follow that a plaintiff in such a situation has the opportunity to rebut the evidence produced and, if the plaintiff successfully discredits the defendant's evidence, the plaintiff should obtain judgment. Cf., Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 n.10

(1981).

In the instant case, the testimony presented by Petitioners' experts successfully rebutted the City's evidence of validity. Nevertheless, as shown below, the trial and appellate courts ignored this rebuttal evidence and simply accepted the City's validity attempts without any serious questioning. Thus, the reasoned review required by Wards Cove did not take place. A determination on that issue by this Court will provide further instruction to lower courts as to how evidence of business justification is to be evaluated.

B. The City's Evidence Of Validity Was Conclusively Rebutted By Petitioners

The City's evidence of validity primarily consisted of a "Technical Report" by Dr. Henderson in which he purported to demonstrate the validity of his

examination under both the content and criterion validity theories. This report, originally begun in 1983 after the examination, was not completed and produced until 1986, some three years after the examination was given. The objectivity of such a report, prepared specifically for litigation by a person with an obvious interest in its approval by a court, is highly questionable. Albermarle Paper Co. v. Moody, 422 U.S. 405, 433 n.32 (1975).

The panel decision adopts the factual statement of the District Court as to the evidence submitted by the City. Yet, many of those statements of fact have no support in the record.[10] In the instant

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[10]The Findings of Fact of the Opinion of the District Court contain no references to the record and in fact, were largely taken verbatim from the City's Proposed Findings of Fact which also do not refer to the record. Findings adopted directly from a party should be viewed "with particular, even painstaking, care." Berger v. Iron workers Reinforced Rodmon Local 201, 843 F.2d 1395 (D.C. Cir.

case, the record shows that the District Court did not adequately evaluate the evidence of validity presented by the City in support of its selection procedure especially considering the credibility concerns presented by Dr. Henderson's post hoc validation attempts which are so inherently suspect. Such a failure to evaluate the evidence is inconsistent with the duty to apply a reasoned review.

According to EEOC's Uniform Guidelines on Employee Selection, 29 C.F.R. § 1607, the City was required to show that its selection procedure was "operationally validated." In other words, the City was

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1988), quoting Southern Pacific Communication Co. v. AT&T, 740 F.2d 980, 984 (D.C. Cir. 1984). Such findings demand careful scrutiny by the reviewing court and must be more narrowly examined. EEOC v. Federal Reserve Bank, 698 F.2d 633, 639-642 (4th Cir. 1983), rev'd on other grounds sub. nom. Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984. The Sixth Circuit decision is devoid of any indication of such scrutiny.

required to show that a higher score would likely result in better job performance. The Guidelines provide for three types of validation: content, construct and criterion. The District Court held that the City succeeded in showing that its examination was valid by all three methods and the Court of Appeals agreed. However, the record is lacking in support for this conclusion.

One of the most glaring deficiencies in both the lower court opinions in this regard is the conclusion that the examination was construct valid in light of the fact that the City presented no evidence of construct validity.[11] Both the Dis-

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[11] The Sixth Circuit decision refers to Dr. Henderson's technical report in which test scores were compared with ratings of active firefighters as proof of construct validity. However, that study represented Dr. Henderson's attempt to prove criterion validity, which is an entirely different method of validation. Dr. Henderson's report does not purport to present evidence of construct validity.

trict Court and the Court of Appeals have simply failed to address this deficiency. The finding that the examination was construct valid is a clear indication of the failure of both the trial and appellate courts to apply even a minimal level of scrutiny to the evidence presented by the City.

Content validity is appropriate where the content of the test closely approximates tasks actually performed on the job. Content validity should be based on a thorough job analysis identifying the important work behaviors and knowledge, skills and abilities necessary for successful job performance. Guardians Association v. Civil Service Commission, 633 F.2d 232 (2d Cir. 1980). To be content valid, the exam must measure the abilities and traits shown by the job analysis to be important. United States and Firefighters

for Racial Equality v. City of St. Louis, 549 F. 2d 506 (8th Cir. 1977).

Dr. Henderson did perform a job analysis prior to the development of the 1983 firefighter examination. Based on questionnaires filled out by active firefighters, abilities necessary for firefighting were identified and ranked in order of importance. The firefighters ranked hand-eye coordination and balance at the top and relative strength and relative power (speed) at the bottom.

According to the City's expert's job analysis, of the twelve physical abilities ranked, speed is twelfth in importance. (See Table 2 of Technical report, p. 32, JA 1729) Yet two of the events on the physical examination were scored according to the time in which they were performed. Event two required applicants, in part, to sprint up and down stairs carrying fire

equipment. The faster one ran through the event, the higher one's score. Event three, the dummy drag, was supposedly meant to replicate the drag rescue of a victim from a smoke-filled room but was also timed and scored the same way as event two.

Neither event is representative of the way in which firefighters perform their job.[12] The record is lacking in the kind of evidence that would support the emphasis on speed. Dr. Henderson admitted at trial that he had no empirical evidence to justify the examina-tion's extreme reliance on speed. Moreover, it directly contradicts his own job analysis.

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[12]Indeed, at the Cleveland Fire Training academy, cadets are instructed not to run as fast as possible because it would be unsafe to do so. (JA 1250-1251, 1139) The same is true of the dummy drag. As Dr. Henderson himself testified at trial, firefighters do not and are not trained to run into smoke-filled rooms to perform rescues. (JA 819-906)

Though these events "look like" fire-fighting tasks, the over-emphasis on speed meant that they could not be content valid.

The first part of the test, the barbell lift, is even more obviously flawed. At trial, Dr. Henderson admitted that this event was added to measure absolute muscular endurance of shoulder and upper limbs and not to replicate any tasks performed by firefighters.

Criterion-related validity requires empirical data demonstrating that the selection procedure is predictive of or significantly correlated with a criterion which represents an important work behavior, and that the correlations are practically significant. Enseley Branch, N.A.A.C.P. v. Seibels, 616 F.2d 812 (5th Cir), cert. denied, 449 U.S. 1061 (1980). As shown at trial through testimony of the

only statistical expert to testify, Dr. Henderson's correlations overstate the relationship between the physical performance test and job performance. The effect of the procedure used by Dr. Henderson to select the sample of 113 was to produce a non-representative or biased sample that results in an overstatement of the correlation between the test instrument and job performance.[13] (JA 1336-1341,

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[13]Dr. Henderson tended to choose individuals whose work behaviors were at the extremes, i.e. very good or very poor. This selection procedure had the effect of overstating the true relationship between the test and the criterion of job performance. (JA 1335)

Plaintiffs' expert statistician, Dr. Bernard Siskin, independently determined that the sample of 113 was not representative of the larger population. Dr. Siskin compared the results of this group to the population of 277 and found that the subsample results are consistently 2 1/2 times as large as what the results would have been looking at the full population, and the difference is not attributable to chance. (JA 1335-36, 1277-78; Government Exhibits 27C, 23EE, 27J and 28F)

It would have been possible for Dr. Henderson to compensate statistically for the non-representativeness of the sample prior to performing statistical analyses, but he did

1277-78; Government Exhibits 28F, 28G, 28H 27C, 23EE, 27J, 23DD, 27D.) When the proper statistical adjustment is made for non-representativeness of the sample there is absolutely no evidence of a statistically significant correlation between the 1983 physical performance examination and job performance or any evidence that test performance predicts job performance any better than chance. (JA 1344-45)

Neither the District Court or the Sixth Circuit addressed these statistical inadequacies in Dr. Henderson's criterion-validity study. Again, this wholesale acceptance of Dr. Henderson's study is inexplicable when viewed in light of the substantial criticisms by both Dr. Siskin, the only expert statistician to testify at trial, and Dr. Raymond Mendel, an industrial psychologist. Thus, the holding of

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not do so. (JA 1356-57)

the District Court that the City showed the examination to be criterion valid, and the affirmance of that holding by the Sixth Circuit, cannot be squared with the evidence and can only be the result of according the City's evidence far more deference than is proper.

C. The Decision Of The Sixth Circuit, If Allowed To Stand, Will Have Serious Consequences On The Aspirations Of Women Who Wish To Become Firefighters

Both opinions below recognized that the City's 1983 firefighter exam failed to measure aerobic qualities that are important to effective firefighting. Both opinions, however, relied on Berkman II, 812 F.2d 52, to hold that the City's failure to test for these attributes does not invalidate the examination.

In Berkman II the Second Circuit found that evidence in the record of that

case showed that the test accurately measured the attributes necessary for firefighters to perform their jobs. No such evidence was presented in this case. There was no evidence presented showing that the ability to sprint faster than another person indicates the ability to better perform firefighting tasks in the manner in which they are actually performed - even in emergency situations. Whatever the record in Berkman may have shown, the record in this case simply does not justify a finding of validity for an examination that departs so drastically from the job requirements as outlined in the City's own job analysis.

Moreover, the reliance of the District Court and the Sixth Circuit on dicta in Berkman II concerning the "self-evident" necessity for speed and strength was improper and contrary to the requirement

of this Court for a reasoned review of the evidence of job-relatedness. Wards Cove, 109 S. Ct. at 2126.

At the heart of this case is the selection of candidates by rank order based on scores from a physical agility test which stresses aerobic measures of strength and speed. It is inevitable, given such an exam, that no women ranked high enough to have a realistic chance of being hired when the selection is made top down on the eligibility list. Thus, the use of such a selection system has a devastating effect on the employment opportunities of women.[14]

Given this foreseeable impact,[15] an

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[14]Colker, "Rank-Order Physical Abilities Selection Devices for Traditionally Male Occupations as Gender-Based Employment Discrimination," 19 U.C. Davis L.R. 761, 779 (1986).

[15]Dr. McArdle, an exercise physiologist, testified at trial that if he were asked to construct a pysical examination that would

employer should not be allowed to base its selection procedure on unfounded assumptions. In order to select candidates in such a manner, given such inevitable disparate impact on women, the City should have been required to produce evidence showing that higher scores on the test vary directly with job performance. Both Petitioners and the Government presented expert testimony demonstrating that the City had not met this burden. The courts below, however, ignored this evidence. Instead they unquestioningly accepted the proposition that faster and stronger is better without any empirical evidence to support it.[16]

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cause the most severe disparate impact by gender, he would utilize the 1983 Cleveland test for entry level firefighters. (TR 2550-51)

[16]Similarly, the District Court's acceptance of the proposition that firefighters must be extremely physically fit is not supported. The evidence at trial showed that

Both the District Court and the Sixth Circuit ignored the most salient evidence that women are indeed qualified to perform the job of firefighting: women are doing the job in such cities as New York, Columbus, Seattle, etc. (TR 149-150) And, more directly on point, women are doing the job in Cleveland and are performing quite well, some even better than their male counterparts who were ranked higher on the eligibility list.[17] (TR 649)

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overweight firefighters in the busiest fire stations in the City can effectively perform their job. (TR 655-657) Nor are veteran firefighters individually timed to see how fast they can do specific firefighting tasks. (TR 593-594).

[17]After reviewing Plaintiff's proffer, the Sixth Circuit correctly noted that the female firefighters' testimony could be relevant to the central issue in the case - the validity of the selection device. (Slip Op. at 11) However, the panel then concluded that the improperly excluded evidence did not prejudice Plaintiffs' case because the evidence would be "substantially the same as that of the male firefighters who were allowed to testify on their behalf." (Slip Op. at 11-12) The Sixth Circuit was wrong on this point. The very

Due to the scoring system and use of rank ordering, the selection of firefighters by the City in 1983 was based on two sprinting events and one weightlifting contest. The examination was an athletic competition. By approving such an examination without real evidence demonstrating that sprinting and weightlifting measure abilities necessary for the job, the Sixth Circuit sends the message that municipalities can effectively maintain all-male fire department if they so choose. By granting review of the Sixth Circuit's decision, this Court can convey a different message: that a test that totally excludes women from firefighting jobs will be held to violate Title VII unless there

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reason why it was necessary to have the female firefighters testify is that ther description of a firefighters' day-to-day job duties would establish that the 1983 examination did not test for those duties. Their testimony would have directly contradicted that of the male firefighters.

is credible evidence that the test is sufficiently job-related to justify a result that runs so counter to the goals of Title VII.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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December 1990

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(2)

Supreme Court, U.S.
FILED
DEC 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

BARBARA ZAMLEN, et. al.,

Petitioners,

v.

CITY OF CLEVELAND, et al.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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APPENDIX

Decision of the Sixth Circuit
(on rehearing) (July 30 1990) 1A

Decision of the Sixth Circuit
(June 11, 1990) 2A

Opinion of the District Court
(May 27, 1988) 22A

No. 88-3614

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BARBARA ZAMLEN, ET. AL.,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
CITY OF CLEVELAND,	)	
	)	
	)	ORDER
Defendant-Appellee,	)	
	)	
GEORGE V. VOINOVICH, MAYOR, ET AL.	)	
	)	
Defendant	)	

BEFORE: BOGGS and NORRIS, Circuit Judges; and ENGLE, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues, raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24

No. 88-3614

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BARBARA ZAMLEN; CHARLEEN CUFFARI; SHARON PIROSKO; LEANA ADKINS; JENNIFER GARUCCIO; CONCETTA K. ZINGALE; and DIANE HORNE,

Plaintiffs-Appellants,

v.

THE CITY OF CLEVELAND,

Defendant-Appellee,

GEORGE V. VOINOVICH,

Defendant.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed June 11, 1990

Before: BOGGS and NORRIS, Circuit Judges; and ENGEL, Senior Circuit Judge.

ALAN E. NORRIS, Circuit Judge. Plaintiffs appeal from an order of the district court entering judgment for defendants in this class action lawsuit alleging intentional discrimination under 42 U.S.C. § 1983, and municipal conduct causing a prohibited disparate impact under Title VII of the Civil

Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The suit, which was brought on behalf of entry-level female firefighters in the City of Cleveland, challenged the rank-order written and physical capabilities selection examination established by the city as perpetuating the exclusion of women from firefighting positions. The district court granted defendants' motion for a directed verdict on the charge of intentional discrimination and, at the close of all the evidence, found for defendants on the Title VII claim.

Citing *Spurlock v. United Airlines, Inc.*, 475 F.2d 216, 219 (10th Cir. 1972), the district court concluded that the possibility of hiring unqualified firefighters poses such significant risks to the public that it was appropriate to hold the city to a lighter burden of proving that its employment criteria were job-related than would be the case if the job at issue did not implicate public safety. The district court then concluded that the examination was job-related and validated according to content, construct and criterion-related validation studies and that plaintiffs failed to establish the existence of a less restrictive alternative. Finally, the district court held that there was a sufficient correlation between higher test scores and job performance to warrant a rank-order hiring procedure. *Zamlen v. City of Cleveland*, 686 F. Supp. 631 (N.D. Ohio 1988).

On appeal, the unsuccessful female applicants challenge the decision of the district court on five bases: (1) the section 1983 claim was improperly dismissed on a motion for a directed verdict because they presented a prima facie case of intentional discrimination; (2) the district court improperly excluded the testimony of women firefighters; (3) the district court improperly allocated the burdens and invoked the *Spurlock* doctrine; (4) the 1983 entry-level firefighter examination was not properly validated; and (5) plaintiffs demonstrated less restrictive alternatives to the challenged examination. For the reasons that follow, we affirm the district court.

I. BACKGROUND

Much has been written about historical discrimination based upon race, sex, and national origin in public service occupations such as law enforcement and firefighting.[1] In order to address the problem, many municipalities have employed rank-order written and physical abilities tests which ostensibly allow employers to select candidates who possess the highest degree of skills required to perform the job.[2] Although these tests have been designed to eliminate discriminatory hiring practices, some have been shown to have a disparate impact on women and, for that reason, are challenged.

Two claims are usually advanced in support of the argument that rank-order physical tests unfairly discriminate against women. First, it is said that these tests measure attributes in which men traditionally excel, such as speed and strength (anaerobic traits), while ignoring those in which women traditionally are said to excel, such as stamina and endurance (aerobic traits). Second, it is claimed that the tested attributes are not necessarily related to the skills which the specific job requires. The examination at issue was challenged for precisely these reasons.

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[1]*See, e.g.*, Epstein, *Women in the Firehouse: The Second Circuit Upholds a Gender-Biased Firefighters' Examination*, 54 Brooklyn L. Rev. 511 (1988); Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 Va. L. Rev. 1297 (1987); Canton, *Adverse Impact Analysis Of Public Sector Employment Tests: Can a City Devise a Valid Test?*, 56 U. Cin. L. Rev. 683 (1987); Colker, *Rank-Order Physical Abilities Selection Devices for Traditionally Male Occupations as Gender-Based Employment Discrimination*, 19 U.C. Davis L. Rev. 761 (1986).

[2]In jurisdictions employing rank-order testing, candidates are graded on their test performance and an eligibility list is compiled in which scores are ranked from high to low. In contrast, tests administered on a pass/fail basis allow employers to select candidates from a pool of qualified applicants. Applicants may be chosen from the pool randomly or in accordance with an affirmative action policy.

As of 1977, the city had never hired any woman firefighters. In that year, it hired Dr. Norman Henderson, a tenured professor of psychology at Oberlin College who had significant experience developing tests for various municipalities throughout the country, to design, administer and score an entry-level firefighter examination. Dr. Henderson was again hired to develop and administer an entry-level exam in 1980.

No women were hired after the 1977 and 1980 examinations were scored and the applicants ranked. Out of 911 applicants who took both the written and physical portions of the examination in 1980, 18 were female. Only one female, or 5.6% of the women who took the exam, scored high enough to be placed on the eligibility list. With a ranking of 634, however, she was too far down the list to be hired. In contrast, 787 male applicants, or 88.2%, were placed on the eligibility list.

In 1983, Dr. Henderson was once again hired by the city to design and administer an exam for firefighters. In light of the female applicants' poor performance on the 1977 and 1980 examinations, and in order to minimize any disparate impact which his previous examinations may inadvertently have had on female applicants, Dr. Henderson prepared a new job analysis. The purpose of this new job analysis was to:

> (1) establish a list of tasks required of entry-level firefighters;
>
> (2) determine the frequency with which each task is performed and its importance to acceptable job performance;
>
> (3) group tasks into broad job dimensions;
>
> (4) assess the knowledge, skills and abilities required for learning and adequately performing critical and highly important job tasks;

(5) determine overall knowledge, skills and abilities required for entry-level fire-fighters with respect to the above tasks; and

(6) identify and define abilities and skills to be tested based upon the above data.

He then compiled an initial tasks list based upon a 1974 survey of 271 Cleveland firefighters. In the survey, firefighters rated 95 firefighting tasks in terms of frequency and importance. This initial list was then reviewed in conjunction with the Ohio Trade and Industrial Education Fire Service Training Manual and tasks lists from other cities. Dr. Henderson then produced a revised list consisting of 150 tasks and submitted this list to Chief William E. Lee, Director of the Cleveland Fire Training Academy. Chief Lee pared this list down to a final checklist of 135 tasks. Dr. Henderson also prepared a list of 12 intellectual and perceptual abilities relevant to effective firefighting.

Based upon this initial research, Dr. Henderson developed final written and physical components of the examination. The written component was designed to test reading comprehension, the ability to follow directions, mathematical skills, and other forms of cognitive reasoning. The physical component consisted of three events:

Event 1: Overhead Lift - using a 33 lb. barbell, candidates miust lift the barbell overhead repeatedly for one minute or up to a maximum of 35 lifts.

Event 2: Fire Scene Set Up and Tower Climb - while wearing a custom-tailored self-contained breathing apparatus, candidates must drag two lengths of standard 2 1/2" hose 180 feet (90 feet one way, drop coupling, run to the other end of the hose, pick up and return 90 feet, drop coupling in designated area), run 75 feet to pumper, remove a one-person ladder (approximately 35 lbs.) from the side of the

> pumper, carry the ladder into the fire tower, place it against the back rail of the first landing and continue up the inside stairwell to the fifth floor where a monitor observes the candidates' arrival. Then, candidates return to the first landing, retrieve the ladder and place it on the pumper.
>
> *Event 3: Dummy Drag* - still wearing their self-contained breathing apparatus, candidates must drag a 100 lb. bag 70 feet (40 of which includes low headroom), turn and, still dragging the bag, return to the starting point.

After the test was developed, but before it was administered, the city embarked on a program to recruit and train female firefighters. As part of its recruitment program, the city provided potential female recruits with a free twelve-week training program. This program, which included a two and one-half hour physical and cognitive portion, began on February 14, 1983. The written portion of the training program was based primarily upon the 1982 edition of the ARCO Civil Service Test training manual. The physical portion, which was based primarily on the content of previous examinations, included training in such activities as dummy lift and carry, dummy drag, hose drag, tower run, fence climb, ladder lift, balance beam walk, and hose coupling. The program did not include training in the use of barbells, nor did the director of the program recommend to any of the women that she work with barbells prior to the examination.

One week before the actual physical examination, the city notified all applicants of the content of the examination, including the barbell event. The training program obtained a set of barbells which was made available to the applicants.

On April 30, 1983, the city administered the written portion of the test and, on May 7 and 13, the physical portion of the test. There were 3,612 applicants initially, but only 2,212 took the written part and 1,233 the physical part. Each

portion of the examination was worth a raw score of 50 points with a maxim achievable score of 100. The raw scores on the written portion were adjusted by capping the scores from different sections, by awarding five extra points to qualifying veterans, by awarding ten extra points to city residents, and by adding up to six points to the scores of minority candidates. The minority adjustment was undertaken as a means of complying with a consent decree entered against the city in a suit by minority candidates alleging bias in hiring. Only those applicants with an adjusted score of at least 35 were eligible to take the physical portion of the exam.

Of the 285 females who took the written portion, 122 passed; of the 1,927 males who took the written examination, 1,206 passed. After taking the physical portion of the examination, 29 females scored high enough on both portions of the exam to be placed on the eligibility list while 1,069 males were placed on the list. However, the woman with the highest score still only ranked 334 on the eligibility list—too low to be hired. The class of 35 firefighters, therefore, contained no women.

On June 14, 1983, plaintiffs filed this class action. The principal defense was that the selection procedure was job-related and properly validated. A second, similar suit was initiated by the United States Government, and the two cases were consolidated for trial.

On January 30, 1986, the class was certified and all individual defendants were dropped. The Title VII claims were tried to the court while the section 1983 and pendent state law claims (common law fraud and violation of administrative procedures) were tried to a jury. After the close of all the evidence, the city moved for directed verdicts on all counts. The district court granted the motion as to the section 1983 and state law claims. At the close of all the testimony on the Title VII claim, the district court found for the city.

II. THE SECTION 1983 CLAIM

In order to make out a prima facie claim under 42 U.S.C. § 1983[3] for intentional discrimination, plaintiffs must demonstrate (1) a deprivation of rights protected under the federal constitution and (2) action under color of state law. *Black v. City of Akron, Ohio,* 831 F.2d 131 (6th Cir. 1987) (citing *Day v. Wayne County Board of Auditors,* 749 F.2d 1199 (6th Cir. 1984)). In order to survive a motion for a directed verdict pursuant to Fed. R. Civ. P. 50(a), plaintiffs must present sufficient evidence such that there is a controverted issue of fact upon which reasonable persons could differ. *Hersch v. United States,* 719 F.2d 873, 876-77 (6th Cir. 1983). After taking the evidence in a light most favorable to the nonmoving party, a motion for directed verdict may only be granted if it is clear that reasonable people could come to but one conclusion from the evidence. *Coffy v. Multi-County Narcotics Bureau,* 600 F.2d 570, 579 (6th Cir. 1979).

Plaintiffs' trial strategy consisted of introducing statistical evidence in the hope of establishing a prima facie case of discriminatory intent which would enable them to survive a motion for a directed verdict on the section 1983 claim. Relying upon the testimony of Martina Dusenberry, a mathematical statistician employed by the Employment Litigation Sec-

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[3]Section 1983 provides:

> [1] Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

tion, Civil Rights Division, of the United States Department of Justice, plaintiffs asserted that the disparate impact on women as a result of the 1983 exam was so statistically significant that this alone was sufficient to establish a prima facie case of discriminatory intent. At the close of the presentation of their statistical evidence, however, the district court, apparently unconvinced that Dusenberry's testimony alone had established a prima facie case of discriminatory intent, asked plaintiffs if they wished to present additional evidence in support of their prima facie case.

Although plaintiffs contended that they had additional evidence in support of their section 1983 claim, they declined the court's suggestion that it might be prudent to present more evidence at this stage, and elected to wait until the rebuttal phase of their Title VII action to proffer additional expert testimony regarding the construction, administration, and scoring of the test. None of this additional evidence was before the district court when it ruled on the motion for a directed verdict. Accordingly, the issue before us is whether the statistical evidence presented prior to defendants' motion for a directed verdict was sufficient to establish a prima facie case of intentional discrimination.

Both parties rely upon *Black v. City of Akron, Ohio,* 831 F.2d 131 (6th Cir. 1987), in support of their respective positions. In *Black*, this court held that "statistical proof may be used in actions under 42 U.S.C. § 1983" and that "allegations of statistical evidence of an adverse impact *might* be sufficient to survive summary judgment." *Id.* at 133 (emphasis added). *Black* does not say, as the city contends, that statistical evidence alone is insufficient to sustain an action under section 1983. Nor does it say, as plaintiffs contend, that statistical evidence is by itself always sufficient to create a prima facie case of intentional discrimination. *Black* stands only for the proposition that statistical evidence may be introduced to show a discriminatory purpose. The sufficiency of the statistical evidence proffered, however, still needs to be

weighed by the district court in order to determine if it supports an inference of intentional discrimination.

Plaintiffs' statistical evidence, while not insignificant, simply was insufficient to demonstrate intentional discrimination. Having concluded that the evidence presented was, at best, amorphous, the district court was correct in granting defendants' motion for a directed verdict on the claim of intentional discrimination.

III. EXCLUSION OF WOMEN FIREFIGHTERS' TESTIMONY

Plaintiffs' second assignment of error is that the district court improperly excluded the testimony of women firefighters who had been hired pursuant to a 1985 court-approved agreement between the city and plaintiffs. Although the district court, in granting the city's motion in limine to exclude the testimony, did not explain the basis for this decision, the court did incorporate by reference the arguments the city made in its supporting memorandum.

The city argued, essentially, that the testimony would be irrelevant and, even if relevant, more prejudicial than probative. If the jury discovered that the city had already hired women firefighters outside its normal selection procedure, the city argued, "they would undoubtedly infer that the City or this Court believed that the City's selection method was faulty."

Plaintiffs' proffer suggests that the testimony would have been relevant to plaintiffs' case. According to the proffer, the female firefighters would have testified about:

1. Their experiences in the Cleveland Firefighters Training Academy, including information about the type of training they received and the type of exercises that were stressed.

2. Their relevant employment history.

3. Their conclusions that the events on the 1983 physical performance examination were not representative of their actual duties.

4. Their assignments since graduating from the firefighting academy.

Testimony of that nature could be relevant to a central issue in this case—the validity of the selection device. While the judge may have been motivated by a desire not to confuse or prejudice the jury, the decision to exclude all the proffered testimony was improper. The city was mainly concerned that the jury would conclude that its agreement in 1985 to hire female firefighters was tantamount to a concession of liability in this case. However, the female firefighters could have testified without alerting the jury to the manner in which they were hired.

In reviewing a trial court's decision to admit or exclude evidence on the basis of relevancy, unfair prejudice, or confusion of the issues, two factors must be considered. First, a reviewing court will not reverse such a decision on appeal absent a showing of a clear abuse of discretion. *Conklin v. Lovely,* 834 F.2d 543, 551 (6th Cir. 1987). Second, even if the lower court's decision amounts to an abuse of discretion, it will not be disturbed on appeal if it did not result in a substantial injustice, as "no error in the admission or exclusion of evidence is ground for reversal or granting a new trial unless refusal to take such action appears to the court to be inconsistent with substantial justice." *McGowan v. Cooper Industries, Inc.,* 863 F.2d 1266, 1271 (6th Cir. 1988) (citing *TCP Industries, Inc. v. Uniroyal, Inc.,* 661 F.2d 542, 550 (6th Cir. 1981)).

While the district court perhaps was overzealous in its attempt to protect the jury from unfair prejudice, we are unable to conclude that its decision prejudiced plaintiffs' cause, resulting in substantial injustice. The evidence which plaintiffs wished to present through the testimony of the

female firefighters was substantially the same as that of the male firefighters who were allowed to testify on their behalf. Similarly, they did present their own expert testimony and had ample opportunity to cross-examine the city's witnesses. While we view the decision of the district court as unfortunate, under these circumstances we are unable to conclude that the exclusion of the female firefighters' testimony was prejudicial to plaintiffs' cause.

IV. ALLOCATION OF BURDENS

The purpose of Title VII[4] is to achieve equality of employment opportunities through the eradication of employment barriers which discriminate on the basis of race, gender, religion, and other protected classifications. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-31 (1971). The Supreme Court

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[4]42 U.S.C. § 2000e-2(a) and (h) provide, in pertinent part:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

. . . .

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin . . . .

has recognized that Title VII forbids not only overt discrimination "but also practices that are fair in form, but discriminatory in operation." *Griggs*, 401 U.S. at 431. Employment practices which, although facially neutral, are discriminatory in practice have given rise to the theory of liability commonly known as the disparate impact theory. Under this basis for liability, a specific employment practice may be deemed violative of Title VII without proving the employer's subjective intent to discriminate. *Wards Cove Packing v. Atonio*, 109 S. Ct. 2115, 2119, 104 L. Ed. 2d 733, 744 (1989). Here, plaintiffs proceeded under the disparate impact theory.

In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Supreme Court outlined the burdens of the parties in disparate impact cases:

> Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question." [*Griggs v. Duke Power Co.*, 401 U.S. at 432.] This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination, i.e., has shown in effect that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). If an employer does then meet the burden of proving that its tests are "job related," it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in "efficient and trustworthy workmanship." *Id.* at 801.

Albemarle, 422 U.S. at 425.

In *Wards Cove*, the Supreme Court clarified prior case law by pointing out that once a plaintiff has made out a prima facie case,[5] it is not the burden of persuasion which shifts to the employer; instead, at that point, the employer shoulders the burden of production, of producing evidence of a business justification: "The ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff *at all times*." *Wards Cove*, 109 S. Ct. at 2126, 104 L. Ed. 2d at 753 (citing *Watson v. Fort Worth Bank & Trust Co.*, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988)).

Prior to *Wards Cove*, this circuit adopted the doctrine announced in *Spurlock v. United States Airline, Inc.*, which allows an employer to meet a lighter standard of proof of job-relatedness where the job at issue clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great. *Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251 (6th Cir. 1981).

The district court specifically held that firefighting poses sufficient risks to the public's safety to invoke the *Spurlock* doctrine: "The risks to the public in terms of life, limb and property as a consequence of hiring an unqualified firefighter are great, resulting in a less heavy burden for demonstrating the job relatedness of the employment criteria." *Zamlen*, 686 F. Supp. at 654. On appeal, plaintiffs contend that, since the *Spurlock* doctrine was intended to apply to jobs which require special skills or abilities "which are extremely difficult to define with significant precision and even harder—to the extent so identified—to test for or measure," *Davis v. City of Dallas*, 777 F.2d 205, 215 (5th Cir. 1985), *cert. denied*,

[5]A plaintiff may present a prima facie case of discrimination under Title VII either by showing that the disputed practice has a disparate impact or, pursuant to the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4D (1985), that she was less than four-fifths as likely to be hired as an equally qualified man.

476 U.S. 1116 (1986), and since the 1983 examination at issue was designed to measure tangible, objective cognitive abilities and concrete physical capabilities, the district court improperly invoked this doctrine.

Actually, we need not decide whether the *Spurlock* doctrine was properly invoked since, in view of the Supreme Court's intervening opinion in *Wards Cove,* whether the district court lowered the city's burden of persuasion is no longer at issue. The city had only the burden of *producing* evidence to justify the use of its selection device. Since the city was found to have satisfied the *Spurlock* burden of persuasion, and that burden is still more onerous than the burden of production which the city actually is obligated to bear under *Wards Cove,* the city, having met the heavier burden, necessarily satisfied the lighter burden. While one may produce without persuading, one cannot persuade without first producing. Accordingly, plaintiffs were not harmed by the district court's allocation of burdens.

V. ADEQUACY OF VALIDATION PROCEDURES AND FAILURE TO MEASURE AEROBIC CAPACITY

The standard of review in Title VII cases is strict. As this court recently recognized,

> [w]hen reviewing the district court's factual findings in a Title VII discrimination case, we may not reverse unless we find that the district court committed clear error. If the district court's account of the evidence is plausible . . . the court of appeals may not reverse it even though . . . it would have weighed the evidence differently.

Wrenn v. Gould, 808 F.2d 493, 499 (6th Cir. 1987) (citing *Anderson v. Bessemer City,* 470 U.S. 564, 573 (1985)).

The Equal Employment Opportunity Commission ("EEOC") has developed guidelines "to assist employers . . .

to comply with requirements of Federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex and national origin . . . [and] to provide a framework for determining the proper use of tests and other selection procedures." 29 C.F.R. § 1607.1(B). Under the guidelines, employers may use three types of studies to validate an employee selection procedure: content, construct, or criterion-related validity studies. The particular device that is chosen depends upon the nature of the job, the way in which the test will be interpreted, and the type of data that is available.

A content validity study is appropriate when test items directly measure abilities that are prerequisites to entry-level job performance (for example, a shorthand test for a secretarial position). Content validity studies must include a thorough job analysis identifying the most important knowledge, skills, and abilities necessary to successful job performance. *Guardians Association v. Civil Service Comm'n of New York*, 633 F.2d 232, 242 (2d Cir. 1980). An employer who seeks to validate a physical examination on the basis of a content validity study must therefore focus on the job's actual physical requirements. In addition, an employer must avoid testing for those skills that can readily be learned on the job.[6]

A construct validity study tests for abstract qualities that are difficult to test but that are, nonetheless, important characteristics for proper job performance. Such studies are appropriate where the necessary qualities, such as creativity, cannot be measured directly. Construct validity studies are

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[6]29 C.F.R. §§ 1607.5(F) states:

> (F) *Caution against selection on basis of knowledge, skills, or ability learned in brief orientation period.* In general, users should avoid making employment decisions on the basis of measures of knowledge, skills, or abilities which are normally learned in a brief orientation period, and which have an adverse impact.

usually not appropriate for validating physical exams because these qualities are readily observable and quantifiable.

Finally, a criterion-related study, which also makes use of empirical data, indirectly tests for those skills necessary for successful job performance. According to the guidelines, a criterion-related study "should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance." 29 C.F.R. § 1607.5(B).

The district court found that the 1983 examination was properly validated according to content, construct, and criterion validation principles. Nonetheless, plaintiffs attack the district court's finding on the ground that the test that Dr. Henderson developed was not properly validated and, in addition, did not test for all of the attributes he identified in his job analysis as important to an effective firefighter. Although Dr. Henderson recognized that successful firefighters must possess a high level of aerobic capacity and aerobic fitness, as well as muscle strength, muscular endurance, flexibility, coordination, muscle balance, and speed, the physical portion of the 1983 examination measured anaerobic—maximal speed and strength—but not aerobic—stamina or paced performance—traits.

We first note that there was substantial evidence before the district court supporting the conclusion that the examination was properly validated. Each event in the physical examination was designed to test a representative firefighting task. The barbell lift was designed to simulate the use of a pike pole to tear out ceilings. The fire scene set-up and tower climb event was intended to duplicate critical firefighting tasks performed where speed is the most critical factor, such as setting up ladders and climbing stairs. The dummy drag simulated the rescue of a disabled person under circumstances where heat and smoke make it difficult to stand upright. Although plaintiffs attack the content validity of these events as only

superficially replicating an actual sequence of job tasks, an expert testified that these events did, in fact, simulate actual firefighting tasks. Plaintiffs may find fault with the way in which the district court came to certain conclusions but there is an insufficient basis for us to conclude that these conclusions are clearly erroneous.

Similarly, plaintiffs argue that there was insufficient evidence supporting the district court's conclusion that the examination was construct and criterion valid. However, plaintiffs ignore the substantial evidence before the district court, including Dr. Henderson's technical report correlating higher test scores with higher supervisor ratings as well as Dr. Henderson's further analyses, supporting the conclusion that the examination was construct and criterion valid.

Plaintiffs' most forceful argument is that the 1983 examination failed to measure attributes which are concededly important to effective firefighting, attributes in which it is often argued that women traditionally excel, such as stamina and endurance. By failing to test for these aerobic qualities, plaintiffs argue, Dr. Henderson devised an examination hopelessly biased in favor of male applicants who will almost always score higher than female applicants on tests which solely measure anaerobic qualities such as strength and speed.

A similar case was decided recently in the Second Circuit. In *Berkman v. City of New York*, 812 F.2d 52 (2d Cir. 1987) ("Berkman IV"), plaintiffs argued that a firefighter exam used by the City of New York to select entry-level firefighters should be invalidated because it failed to measure aerobic capacity and placed undue emphasis on anaerobic performance. Recognizing that aerobic attributes are an important component of effective firefighting, the court nonetheless held that the city's failure to include events that test for such qualities did not invalidate the examination. While the court implied that an examination that included events which tested an applicant's aerobic energy system would be prefera-

ble, "[i]t does not follow, however, that a physical test of the ability to perform simulated job tasks of firefighters, without a specific measurement of stamina, lacks validity to a degree that renders it vulnerable to a Title VII challenge." *Berkman*, 812 F.2d at 59.

While aerobic ability enables firefighters to sustain a consistent level of energy over a long period of time, speed and strength are critical at the initial stages of a fire where matters of life and death are most acute. A firefighter who tires may be replaced by a fresh recruit but, as the *Berkman* court recognized, "if the first firefighters on the scene are deficient in the speed and strength necessary to handle their tasks, those in need of immediate rescue will not be comforted by the fact that those first on the scene might be able to sustain their modest energy levels for a prolonged period of time." *Berkman*, 812 F.2d at 60. Here, the district court concluded that anaerobic qualities are more important. Certainly, we are unable to say a fire department is not entitled to select firefighters whose abilities enable them to act more effectively in the first moments of a fire. Accordingly, although a simulated firefighting examination that does not test for stamina in addition to anaerobic capacity may be a less effective barometer of firefighting abilities than one that does include an aerobic component, the deficiencies of this examination are not of the magnitude to render it defective, and vulnerable to a Title VII challenge. *Berkman*, 812 F.2d at 59.

VI. LESS RESTRICTIVE ALTERNATIVE

Finally, plaintiffs contend that a different scoring system —one which would eliminate the addition of variable numbers of minority points, the use of the capping system and the addition of veterans' points—would have raised the rank-order of women on the eligibility list and, thus, constitutes a less restrictive alternative. Under *Wards Cove*, once the plaintiffs have shown that other nondiscriminatory means exist which could effectively serve the employer's legitimate

interests, the employer must adopt them or risk the inference that the preferred test is a pretext for discriminatory conduct. *Wards Cove,* 109 S. Ct. at 2126-27, 104 L. Ed. 2d at 753-54.

The district court concluded that plaintiffs failed to demonstrate a less restrictive alternative, a conclusion with which we agree. Although the use of a different scoring system might raise the rank-order of women on the eligibility list, given the fact that the woman with the highest test score still only ranked 334 on the eligibility list, and that the city only hired approximately forty firefighters each year, it is doubtful that any alternative scoring system would have had less of a disparate impact on women. The evidence suggests that, at best, an alternative scoring system would result in female applicants ranking higher on the eligibility list, but still too low to actually be hired. Since rescoring the examination is unlikely to result in higher numbers of successful female applicants, it is an insufficient reason to invalidate an otherwise lawful examination.

CONCLUSION

Because the examination did parallel the actual tasks which firefighters perform on the job, and the city did demonstrate a direct correlation between higher test scores and better job performance, the examination withstands plaintiffs' challenge. Accordingly, the judgment of the district court is **affirmed.**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

BARBARA ZAMLEN, et al.,	) A. I. KRENZLER
	) JUDGE
Plaintiff	)
	)
-vs-	) CASE NO.
	) C83-2484
CITY OF CLEVELAND, et al.,	)
	)
Defendants	)
	)
UNITED STATES OF AMERICA	)
	)
Plaintiff	) CASE NO.
	) C83-4998
	)
-vs-	) MEMORANDUM OF
	) OPINION AND
CITY OF CLEVELAND, et al.,	) FINDINGS OF
	) FACT AND
Defendants	) CONCLUSIONS OF
	) LAW

This Memorandum of Opinion and Findings of Fact and Conclusions of Law will be written in several sections. First there will be a discussion in the form of a memorandum of opinion. Second, there will be findings of fact and conclusions of law. Finally, there will be general conclusions.

I. Procedural Background

In Case No. C83-2484, the named plaintiffs, who brought the action on behalf of themselves and as class representatives, include Barbara Zamlen, Charlene Cuffari, Sharon Pirosko, Leana Adkins, Jennifer Garuccio, Concetta K. Zingale, Diane Horne, and Denise Campbell. The class includes all women who were unsuccessful applicants for entry-level firefighters in 1983 for the City of Cleveland ("City").

The original defendants included the City of Cleveland; George Voinovich, Mayor; Reginald M. Turner, Director, Department of Public Safety ("Safety Director Turner"); Thomas Skulina, President, Civil Service Commission; Edmund J. Turk, Vice-President, Civil Service Commission; Irene M. Morrow, Secretary, Civil Service Commission; Nancy Oliver, Civil Service Commission member; Solomon Harge, Civil Service Commission member; Karl Schneider, Personnel Administrator, Civil Service Commission; James McNamee, Fire Chief for the City ("Chief McNamee"); and Norman D. Henderson, Personnel Testing and Statistical Analysis ("Dr. Henderson"). All of the public officials were sued as individuals and in their official capacities.

The action was originally brought in four counts. Count One alleged that both the physical and written portions of the examination for entry-level firefighters in the City had an adverse impact on women applicants, was discriminatory, and violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq. ("Title VII"). Count Two alleged a violation of 42 U.S.C. 1983 ("§ 1983") based upon violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Count Three alleged a conspiracy among the defendants under 42 U.S.C. § 1985(3) ("§ 1985(3)") to deprive the plaintiffs of their rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Count Four alleged that the defendants committed fraud by violating Ohio Rev. Code Ann. § 124.58, in that the defendants defeated, deceived or obstructed the plaintiffs' rights of examination, appointment or employment.

The plaintiffs are seeking injunctive relief as well as back-pay, prejudgment and post-judgment interest, costs, attorneys' fees, and such other permanent relief as the Court deems just and proper.

The municipal defendants filed an answer which is in the form of a general denial of all of the principal allegations of the plaintiffs' complaint. In addition, the municipal defendants raised several affirmative defenses including that the selection device at issue is job related and predictive of job performance. Dr. Henderson filed a separate answer in the form of a

general denial of all of the principal allegations of the amended complaint. In addition, he asserted several affirmative defenses, the principal one being that the test that he designed and administered was job related.

In Case No. C83-4998, the United States of America ("United States"), the plaintiff, brought the action against the following named defendants: the City, Cleveland Civil Service Commission, Cleveland Fire Department, and in their official capacities, Turner, Director, Department of Public Safety; McNamee, Fire Chief, Cleveland Fire Department; Thomas Skulina, Edmund J. Turk, Irene M. Morrow, Nancy Oliver, Solomon Harge, members of the Cleveland Civil Service Commission.

This action was brought pursuant to §707 of the Civil Rights Act of 1964, 42 U.S.C. +2000e-6(a). The United States alleges that the defendants are responsible for establishing the terms, conditions, and other practices which bear upon the employment of firefighters in the City. The City employs approximately 961 individuals in sworn positions in the Cleveland Fire Department. At the time the complaint was filed not one of them was a woman. It is alleged by the United States that the defendants have pursued, and continue to pursue, policies or practices which discriminate against women and which deprive or tend to deprive women of employment opportunities because of their sex. It is alleged that the defendants have failed to adopt and use selection procedures for hiring which do not have an adverse impact on women and which are valid predictors of successful job performance or which are shown to be required by business necessity. The defendants' acts and practices constitute a pattern or practice of resistance to women's right to the full enjoyment of equal employment opportunities within the Cleveland Fire Department.

The United States is only seeking injunctive relief against the defendants to halt discrimination on the basis of sex in hiring, training and the assignment of female applicants or employees. The defendants filed an answer in the form of a general denial and raise the same affirmative defenses as in Case No. C83-2484. The two cases were consolidated for trial.

CLASS CERTIFICATION

In Case No. C83-2484, the Court certified the class as all unsuccessful women applicants for the 1983 entry-level firefighters examination in the City and all future women applicants.

DISMISSAL OF DR. NORMAN D. HENDERSON

The defendant Dr. Henderson was dismissed as a party defendant through settlement prior to trial.

DISMISSAL OF OTHER DEFENDANTS

Prior to and during trial, all of the public officials were dismissed as defendants in the litigation.

DISMISSAL OF COUNTS TWO, THREE AND FOUR OF CASE NO. C83-2484

At the end of the plaintiffs' case, the defendants moved for a directed verdict as to all four counts of the complaint. The Court granted the defendants' motion as to Count Two, the §1983 case; Count Three, the conspiracy or § 1985 case, and Count Four, the pendent state claim for fraud. After dismissal of Counts Two, Three and Four and of the parties listed above, the trial continued as to Count One, the Title VII case against only the City.

II. Discussion

This is a typical Title VII case with the usual three-part procedures for trial. The plaintiffs must first establish a prima facie case of sex discrimination. The defendants must then establish a business purpose or, in this case, the job relatedness of the test used to select firefighters. The plaintiffs must then proceed to establish that the job-related test is a pretext for discrimination. This is done by proving that there is another test that is equally job related, will have less adverse impact on women, is not discriminatory, and that will result in a strong probability that women applicants will be hired as entry-level firefighters. The purpose of this portion of the trial is to show pretext and to negate the finding that the test given was nondiscriminatory.

There are many discrimination cases brought against governmental agencies by the United States or by minorities. Many of these cases are resolved by consent decrees which

provide for set asides, which give a certain percentage of the jobs to minorities. When these cases are challenged they are usually upheld on the basis of a finding of past discrimination against the minority.

Further, many municipalities now have affirmative action plans which accomplish the same result as these consent decrees. When affirmative action plans are challenged, they also are usually upheld on the basis of past discrimination. The courts have held that municipalities can set aside or provide for a certain percentage or a number of entry-level positions and/or promotions for minorities.

In the present action, we are not dealing with black, white, or Hispanic male applicants for entry-level firefighters. Also, there is no consent decree or affirmative action plan which sets aside jobs for women. The question in the instant action is whether the theory of current preferential hiring to remedy past discrimination which applies to other minorities also applies to women.

There is no question that women have been discriminated against in many fields, intentionally or otherwise. There is no dispute that discrimination against women is unlawful. 42 U.S.C. §§ 2000e, et seq.; Berkman v. City of New York, 812 F.2d. 52 (2d Cir. 1987); Brunet v. City of Columbus, 642 F. Supp. 1214 (S.D. Ohio 1986), appeal dismissed, 826 F.2d. 1062 (6th Cir. 1987). There can be no job discrimination on the basis of sex. The question is whether courts should recognize the fact of past discrimination against women and afford the same type of relief as that given to other minorities because of past discrimination.

In the case of blacks, the courts have made an accommodation because of past discrimination. However, current law does not provide that a certain percentage or number of jobs must be set aside for women because of past discrimination. Further, current law does not require that an affirmative action plan have a percentage or a stated number of women as entry-level firefighters. It is possible that this could be accomplished voluntarily by a consent decree or an affirmative action plan. No such voluntary resolution has occurred in this action. The current law, however, provides only that employers shall not discriminate against women, either in initial hiring or promo-

tion.

Dr. Henderson was hired by the City to prepare entry-level firefighter examinations for 1977, 1980 and 1983. it is the written and physical components of the 1983 examination that are under attack in this action. Simply stated, the plaintiffs are alleging that both the physical and written portions of the examination have an adverse impact on women, are discriminatory, are not job related and, in the alternative, that there are tests that are equally job related that have a lesser adverse impact on women. The City contends that it is not liable because the written and physical components of the examination did not have an adverse impact on women, are job related and are nondiscriminatory.

The City has charter provisions and Civil Service regulations providing for the examination, testing, and hiring, by rank-order of City employees. These provisions provide for preference points which give veterans five points and residents of the City ten points on the Civil Service Examination. Cleveland, Ohio, Charter, ch. 27, § 74. The City also provides for rank-order, one-in-three hiring which means that for every opening three applicants will be considered by the hiring agency. Cleveland, Ohio, Charter, ch. 27, § 131. The procedure used by the City is to have tests, both written and physical, administered and graded. Successful applicants then are certified to the hiring agency.

For entry-level firefighters, the following is the procedure:

(l) written test;
(2) physical examination;
(3) psychological examination;
(4) medical examination; and
(5) background check.

In the present case, there was both a written and a physical examination, each with a maximum of fifty points or a total of 100 points on both components. Seventy percent is passing.

In this action we are dealing with firefighters. Firefighting is a highly skilled profession which requires strength, speed, endurance and a high degree of intellect. Because firefighting is concerned with matters of life and death and destruction of valuable property, it is a very important job. The standards normally applicable to the average job are not necessarily

applicable to firefighting jobs.

The City, a charter city, has decided to use rank order for the hiring of firefighters. The City has decided that it wants the best possible firefighters. There is nothing improper with this, as long as the procedures used are not discriminatory against minorities and women. The City is not required to lower or reduce qualifications for entry-level firefighters for the purpose of accommodating minorities and women. The City can make a policy decision to hire the best qualified applicants and provide for rank-order hiring, but it cannot discriminate. The City could make a policy decision to hire generally qualified and adequate persons for the job, use a rank-order or pass/fail system with random selection and not discriminate. It is the City's choice. In other words, the City is free to choose any system of hiring as long as it does not discriminate against women and minorities.

Further, the City has elected not to have a formal affirmative action plan, as such. Nor is the City required to have an affirmative action plan. It is recognized that Title VII contemplates and encourages voluntary affirmative action plans, but there is no actual legal requirement that the City have an affirmative action plan that would mandate a certain minimum number of women firefighters.

There was testimony in this action that the City had some type of affirmative action plan to encourage women applicants to apply and be hired as firefighters. The City also provided for some training for women applicants over a twelve-week period. This Court does not find that the City has a typical affirmative action plan but only a quasi-policy to afford women applicants an equal opportunity to be hired. This was nothing more than a statement of the law regarding discrimination. This Court would not classify the recruitment and training program for women as a very concentrated effort to qualify women applicants for entry-level firefighters. The so-called affirmative action plan did not provide for a guarantee of the hiring of women firefighters.

Based on the testimony in this action, we are learning more about the strengths and weaknesses of women as firefighters. This is a new phenomenon and will have to be developed. There was testimony at the trial that it will be necessary to develop recruitment and training programs over a long period

of time and have a very concentrated effort to increase the upper body strengths and other strengths of women to qualify as firefighters.

One of the principal complaints of the plaintiffs is that the physical test did not have an aerobic element. There was testimony that the principal portion of the physical examination tested upper body strength, speed, and anaerobic capacity with very little emphasis on aerobic capabilities. This Court finds that for the performance of firefighter's duties strength and speed are more important than aerobics. Aerobics can be tested by the Harvard Step Test, treadmill, bicycle, or other types of stress tests and can be a part of the medical examination, rather than the physical component of the examination.

If the City is serious about affording equal opportunity for women to become firefighters, it must do as Seattle, Washington, did and have a long-range, concentrated, strenuous training program for women applicants prior to examination. In this way their necessary skills can be developed and improved so that they can pass the entrance-level firefighting examinations.

The expert witnesses provided undisputed testimony that in a city such as Cleveland, Ohio, which uses rank-order hiring, has approximately 3,000 applicants for every test, and has the eligibility list expire every two years, it would be virtually impossible for women to be hired inasmuch as only approximately 40 firefighters are hired every year. The highest ranking woman applicant on the eligibility list in 1983 was No. 334.

The plaintiffs in the class action contend that the examination was discriminatory and resulted in an adverse impact against women applicants for the position of firefighters. Thus, the plaintiffs contend that the examination was invalid.

The contested aspects include the following:

(l) adding five preference points to veterans' scores;

(2) adding ten preference points to City residents' scores;

(3) adding one-and-three-quarter points to women's scores for the barbell physical portion of the examination;

(4) recognizing the Headen Decree, Headen v. City of Cleveland, Case No. C73-330 (N.D. Ohio April 25, 1975) ("Headen Decree"), and adding six points to minority appli-

cants' scores on the written portion of the examination;

(5) failing to announce the exact physical examination events to be given;

(6) using a capping system;

(7) using an improper sequence of the physical events;

(8) using nonuniform rest periods between physical events;

(9) using a biased sampling in the validation system used by Dr. Henderson;

(10) using validation by Dr. Henderson which was done too late;

(11) constructing a rank order which was improper;

(12) failing to include an aerobic component in the physical portion of the examination.

(13) permitting late applications to be filed by some male applicants;

Each of the foregoing will be discussed.

1. VETERANS' PREFERENCE - 5 POINTS

This applies equally to men and women and is not considered to be discriminatory against women.

2. RESIDENCY - 10 POINTS

This applies equally to men and women and is not deemed to be discriminatory against women.

3. ADDING BARBELL POINTS FOR WOMEN - 1-3/4 POINTS

Dr. Henderson added one-and-three-quarter points to women's scores for the barbel event because of their lack of familiarity with barbells. Adding these points was advantageous to women and, therefore, not discriminatory against women.

4. RECOGNITION OF THE HEADEN DECREE - 6 POINTS

The Headen Decree was a valid decree of this Court which required the hiring of Black and Hispanic firefighters if they were qualified. There is no question that adding six points to the qualified Black and Hispanic applicants did have some adverse impact on the women. But the Headen Decree binds this Court. while the Headen Decree may have contributed somewhat to the disparate impact, it did not in any way affect the hiring of women firefighters who took the 1983 entry-level examination.

5. ANNOUNCEMENT OF EXACT PHYSICAL EXAMINATION

The City is not required to announce the exact physical tasks to be given on the examination. If the announcement of the written and physical components of the examination is fairly representative of the examination and puts applicants on sufficient notice to prepare for the test, that is all that is required. It is not necessary for the City to give the exact written or physical examination in advance to applicants. All that the City is required to do is to announce, in a fair manner, the type of physical and written examination that will be given in order for the applicants to prepare for the examination. It is not necessary to give the exact events.

6. USE OF CAPPING SYSTEM

This is a method that limits or caps the maximum score that a person can receive on certain sections of the written examination. This permits an applicant to have some wrong answers and still get the maximum score in that section. This does not discriminate against women applicants.

7. SEQUENCE OF EVENTS

The plaintiffs complain about the sequence of physical events. No two fires are exactly alike and the sequence of events varies from fire to fire. It is not necessary for the City to announce in advance the sequence of physical events. The sequence was the same for male and female applicants. The sequence of events in the physical examination in 1983 was fair and reasonable and did not discriminate against women.

8. REST PERIODS BETWEEN PHYSICAL EVENTS

There were rest periods between physical events 1 and 2 and events 2 and 3. There were twelve to fifteen minutes between physical events 1 and 2 and eight to nine minutes between events 2 and 3. These rest periods were fair and reasonable and it was not necessary to have the same rest periods between the physical events. The rest periods did not discriminate against women.

9. BIASED SAMPLING IN VALIDATION PROCEDURES

When the City made its validation study for 1980, it sampled 277 firefighters. when it did the validation study for 1983, it sampled only 113 of those 277 firefighters. The plaintiffs contend that this was a biased sampling. In making

this concurrent validation, the City gave the 1983 physical and written examination to firefighters currently on the force and compared their scores with their academy training records and their job evaluations. While it would have been preferable to have the 1983 concurrent validation use all 277 firefighters, the fact that only 113 of the 277 were used did not result in discrimination against women. This was not a biased sampling.

10. TIMING OF VALIDATION STUDIES

The plaintiffs complain that the 1983 examination was flawed because the validation studies conducted by Dr. Henderson were not conducted in a timely fashion and were conducted merely for the purpose of preparing for the present litigation. There is no question that Dr. Henderson should have conducted his validation studies as soon as possible to make sure that the 1983 examination was job related. However, the question is whether the 1983 examination was or was not job related. It is the results of the validation that matters and not when the validation study is made.

11. RANK ORDER

The Charter of the City requires listing successful applicants in rank order. Cleveland, Ohio, Charter, ch. 27, § 131. For every opening or position to be filled, three names are given to the head of the department. The plaintiffs contend that the rank-order system is improper and that a pass/fail system with random hiring would be more appropriate and have less adverse impact on women and consequently no discrimination.

The City is free to choose either a pass/fail or a rank-order system. Under either method, the test must be job related and not discriminatory. The City, in its Charter, has chosen the rank-order system. It is not for the courts to determine whether the City should be required to have pass/fail or rank order. It is the court's function to decide if the City discriminated in the preparation and administration of the test and the hiring of firefighters.

When a rank-order system is used, the City is required to demonstrate that by using this system, the higher score will result in a better firefighter. Based on the evidence in this action, including and the validation studies, this Court hereby

approves the rank-order system and finds that it has not resulted in discrimination against women applicants for firefighters.

12. AEROBICS

Plaintiffs contend that the physical examination was discriminatory against women because it did not have an aerobic component but only had an anaerobic component. The statistics demonstrate, and the exercise physiologists testified, that men perform better than women in aerobic testing. In longer events, the difference between men and women is less but men still score substantially better than women in aerobic testing. There was no independent aerobic component in the physical examination. However, this lack of an aerobic component in the physical examination is not discriminatory. The aerobic component can be done as part of the medical component of the examination, after applicants pass the written and physical components of the examinations. While both aerobic and anaerobic components are important in firefighting, it is the anaerobic component that is more important because of the nature of firefighting. The initial period of the fire is critical. This is where the anaerobic component comes into play. Not having an independent aerobic component on the physical examination was not discriminatory against women.

13. CITY PERMITTING LATE APPLICATIONS

While the plaintiff introduced some evidence concerning this issue, it was so minor and insignificant that it does not warrant discussion and in no way affected the validity or job relatedness of the examination. It is at best a "throw in" argument of no significance.

There is no question that the statistics in this action demonstrate an adverse impact on women applicants. However, adverse impact by itself does not mean that there was discrimination against women applicants or that the test was not job related. Adverse impact results in discrimination when there is no justification for the adverse impact. If a test results in adverse impact but the test is job related, it will stand as valid unless the plaintiff can demonstrate that another test is equally job related and has lesser adverse impact. Then, the original test will be found discriminatory. The plaintiffs did not prove

that the job-related test designed and administered by Dr. Henderson was a pretext and thus discriminatory, by showing that another test that was equally job related would have a lesser adverse impact to such an extent that Dr. Henderson's test would be considered discriminatory and invalid.

This Court finds that the plaintiffs proved their prima facie case that there was disparate impact. The Court finds that the City proved that the physical and written components of the examination were job related. The Court further finds that the plaintiffs failed to prove that there was an equally job-related, alternative test that would afford lesser adverse impact. Therefore, the plaintiffs failed to prove that Dr. Henderson's test was discriminatory.

FINDINGS OF FACT

1. The selection of firefighters by the City is a multi-component process. First, candidates receive a score based upon performance on 2 professionally designed examination. Where applicable, veteran and/or residency preference points are added to the test scores. Candidates receiving 69.5 or more points are placed, in rank order, on an eligibility list.

2. After establishment of the eligibility list, further selection components include a medical test, a psychological test, and a background check. These three procedures are conducted only upon the highest ranking candidates. These procedures are performed only on a number of applicants which coincide with a particular hiring demand.

3. Insufficiencies in any of the last three selection components result in the removal of the candidate's name from the eligibility list.

4. The general practice, based on the City's Charter is for the Director of Public Safety to hire in strict top/down rank numerical order from the eligibility list. Cleveland, Ohio, Charter, ch. 27, § 131. With respect to hiring firefighters, the only departure from strict top/down rank order hiring has been pursuant to the minority (Black/Hispanic) quota hiring system instituted by the Headen Decree, designed to remedy intentional and egregious racial discrimination.

5. To meet the requirements of the Headen Decree, the City's eligibility list was, in effect, divided into minority and non-minority lists, and appointments to the position of fire-

fighter are made in rank-order from each eligibility list.

6. If selecting firefighters from the eligibility list by numerical order did not produce the necessary number of minorities to reach the 35% required by the Headen Decree, Safety Director Turner would instruct Chief McNamee that only minorities are to be considered.

7. The Cleveland Fire Department has several different types of companies based on the equipment used: (a) engine, (b) hook and ladder, and (c) rescue squads.

8. The City has twenty-eight pumpers, fourteen hook and ladder and three rescue squads.

9. In 1984, the authorized strength of the Cleveland Fire Department was 1,500 sworn officers.

10. According to the 1980 United States Census, the workforce in the Cleveland Standard Metropolitan Statistical Area is 46% female.

11. The necessary physical qualities of a firefighter include manipulative skills and sufficient strength and endurance to perform under fire conditions.

12. Non-physical qualities desired include initiative, courage, judgment, the abilities to learn and to cooperate.

13. The City stated in its Policy Statement of Affirmative Action and Equal Employment Opportunity in 1981 that the "administration is committed to the laws and ideals of Equal Employment Opportunity for minorities, women, and the handicapped." It stated further:

> Specifically the City commits itself to the development and implementation of result-oriented goals, procedures and programs to reduce the under-utilization of minorities and women, and to achieve equity throughout the entire City's work force.

14. During meetings with Chief McNamee and members of his staff, Safety Director Turner found objections being made questioning the physical capacity of women to be firefighters to be invalid.

15. Safety Director Turner expressed his belief that it is an operational need for the City's Fire Department to have a personnel force reflective of Cleveland's population, male and

female, because the community expects this kind of reflection—it provides awareness, a sensitivity to community problems and enhances the division's ability to function within the community.

16. Safety Director Turner did not recommend any new criteria for the employment of firefighters from those applied in prior years except for an effort to recruit minorities and women. Being satisfied with the applicants on the 1980 eligibility list, he had not suggested that either the written or physical components of the examination be made more difficult.

17. Prior to the hiring of the women as firefighters on April 22, 1985 pursuant to this Court's March 20, 1985, Order of Dissolving Preliminary Injunction Subject to Stipulated Conditions, no woman had ever been hired by the City as a firefighter.

18. Women firefighters observed by Assistant Fire Chief William E. Lee ("Chief Lee") performed very well on the job.

19. Women are firefighters presently in the cities of Columbus, Ohio; New York, New York; Seattle, Washington; and other major cities.

20. Pursuant to contract, Dr. Henderson provided examinations for entry-level firefighter selection for the City in 1977, 1980 and 1983.

21. The last three entry-level firefighter examinations given by the City were administered in 1977, 1980 and 1983. The three examinations differed somewhat in detail, but all tested similar cognitive and physical abilities.

22. A predictive criterion study was conducted correlating the performance of 277 firefighters selected from the 1980 examination with supervisory ratings obtained in 1985.

23. In 1980, twenty-eight females filed applications to take the examination.

24. In 1980, 911 applicants took both the written and physical components of the examination. Eight hundred ninety-two were identified as male and eighteen were identified as female. One applicant was unidentified by sex.

25. Of the eighteen persons identified as women who took the physical component portion of the 1980 examination, only one was placed on the eligibility list and was ranked 634, and thus, not high enough to be hired.

26. Three hundred fourteen people were hired from the 1980 eligibility list. Not one was female.

27. Of the male applicants who took both portions of the 1980 firefighter entry examination, 787 or 88.2% were placed on the eligibility list. Of the female applicants who took both portions of the 1980 firefighter entry examination, one or 5.6% was placed on the eligibility list.

28. In 1980, the rate at which women achieved a combined written and physical performance score high enough to be placed upon the eligibility list was 6.3% of the rate at which men achieved a combined written and physical performance high enough to be placed upon the eligibility list.

29. The average number of points received by persons identified as males on the physical performance portion of the 1980 entry-level firefighter examination was forty-one and the average number of points received by persons identified as females on the physical performance portion of the 1980 entry-level firefighter examination was 10.2.

30. The woman who received the highest score on the physical performance portion of the 1980 entry-level firefighter examination received 29.3 points.

31. Dr. Henderson has extensive experience in the area of job analysis and examination development for safety forces, including the position of entry-level firefighter. He has conducted over seventy job analyses and developed numerous tests, both entry level and promotional, for a variety of municipalities for the selection of safety forces.

32. The examination development process included interviews with hundreds of firefighters, the examination of fire training materials, the examination of written materials regarding operational procedures and the examination of equipment. Also used were consultations with high ranking officers, and the questionnaires to ascertain the frequency and importance of firefighting tasks.

33. Dr. Henderson's concern about gender differences and efforts to minimize adverse impact on females originated in the development of the 1977 examination and was a factor influencing development of the 1977, 1980 and 1983 examinations.

34. Building on his previous work, Dr. Henderson began

a new job analysis in December of 1982. The purposes were to: (l) establish a list of tasks required of entry-level firefighters, (2) determine the frequency with which each task is performed and its importance to acceptable job performance, (3) group tasks into broad job dimensions, (4) assess the knowledge, skills and abilities required for learning and adequately performing critical and highly important job tasks, (5) determine overall knowledge, skills and abilities required for entry-level firefighters with respect to the above tasks, (6) identify and define abilities and skills to be tested based on the above data.

35. An initial task list was compiled using data collected in 1974. By that time 271 Cleveland firefighters had rated 95 firefighting tasks in terms of the frequency performed and relative importance.

36. This original task list was reviewed in conjunction with the 1980 revision of the Ohio Trade and Industrial Education Fire Service Training Manual. Other sources examined were Cleveland written materials describing training and performance objectives. Task lists derived from other cities were also reviewed.

37. Revisions resulted in approximately 150 task statements.

38. The task statements were reviewed by Chief Lee, who was then Director of the Cleveland Fire Training Academy and a senior officer with over twenty-six years of firefighting experience. As a result of the review by Chief Lee and interviews with him, a final checklist of approximately 135 tasks was derived.

39. A total of thirty-five firefighters sampled from five fire stations were contacted individually to assist in the development of the job analyses. Firefighters were briefed on the purpose of the task analyses and then asked to review the task list questionnaire to clarify any misunderstanding as to how to complete the questionnaire using a computer-readable answer sheet. Each firefighter was to indicate the frequency with which he performed the job task listed. Firefighters were also asked to make note of any firefighting tasks which they thought had been omitted from the list.

40. Five senior officers in the Division were asked to rate each task listed on the questionnaire in terms of its relative

importance. Each task was rated on a scale ranging from 1 (critical importance) to 4 (minor importance).

41. A list of equipment commonly used in firefighting was also compiled by Dr. Henderson and supplemented by using items found in various manuals. The list was reviewed by Chief Lee and other firefighters who were asked to add and delete items where appropriate. The equipment list was used in part to analyze knowledge skills and abilities involved in individual tasks.

42. Dr. Henderson, in conducting his job analyses, identified and evaluated twelve intellectual and perceptual abilities. They are described in the Technical Report.

43. Dr. Henderson's rating procedure for seventy-five job tasks was in accordance with professionally acceptable standards.

44. The written component of the 1983 examination measured intellectual and perceptual abilities in the approximate degree to which they are represented on the job.

45. Lieutenant John J. McManamon of the Cleveland Fire Department ("Lieutenant McManamon") designed and implemented a pre-examination recruitment and training program for women interested in becoming firefighters. He undertook this program under the direction of Chief McNamee, Chief Gerald Holman and Safety Director Turner.

46. Beginning in the fall of 1982, the City conducted an extensive recruitment campaign designed to advise females of the opportunities for employment as firefighters and to encourage qualified females to seek employment. The City also provided a free twelve-week pre-test training program for females covering both the cognitive and physical abilities necessary for firefighting. There was also a minority pre-test training program conducted by the City which was attended by both males and females.

47. Lieutenant McManamon sought and received funding from the Comprehensive Employment and Training ACt (C.E.T.A.) program for the women's training program to pay for textbooks, equipment and instructors.

48. Classes in the women's training program began Monday, February 14, 1983, and continued for twelve weeks. Classes were held at the Fire Training Academy, as sanc-

tioned by Safety Director Turner, Monday through Thursday evenings from 6:30 p.m. to 10:30 p.m.

49. Due to his expertise, Chief Lee, Director of the Training Academy, was in charge of the classroom portion of the women's training program.

50. The 1982 edition of the "ARCO" Civil Service Test Tutor training manual ("ARCO book") was the textbook used for classroom instruction in the women's training program by instructors Chief Lee and John Lash.

51. Chief Lee encouraged the women to use the ARCO book and advised them that if they studied it well they should be successful on the written exam.

52. The training in the women's training program for the physical component of the 1983 entry-level firefighter examination was based primarily on the content of examinations given in prior years.

53. The physical portion of the women's training program contained evolutions in the following activities:

Dummy lift and carry (approximately 100 pounds);

Dummy drag (approximately 100 pounds);

Foam can carry (approximately 42-1/2 pounds each—2 cans);

Hose drag (two sections of 125 feet weighing approximately 100 pounds);

Tower run (running up 6 stories carrying a 2-1/4 inch section of hose weighing approximately 50 pounds);

Tower run (carrying an air pack weighing approximately 49 pounds and a 1-1/2 inch section of hose weighing approximately 35 pounds);

Six-foot fence climb;

Ladder lift (12-foot extension ladder lifted from a four-foot stage, raised over the head, placed on the floor and replaced in the original position);

Balance beam walk;

Hose coupling (connecting and disconnecting section of 2-1/2 inch hose to fire hydrant).

54. Each session in the women's training program began with a 20-minute warm-up session and a one-mile run. Generally, the physical portion of the training session lasted 2-1/2 hours and the non-physical portion 1-1/2 hours. The

physical portion of each session ended with a volleyball game which lasted from one-half to one hour.

55. Although the discussion between Dr. Henderson and Chief Lee concerning barbells occurred early in the development of the physical agility test, Chief Lee never recommended to any of the women training for the test that they work out with barbells.

56. One week before the actual physical component of the examination, applicants received a notice describing the events that would be on the actual examination. The events listed included a barbell event, in which applicants would be required to press a thirty-three-pound barbell thirty-five times.

57. The lifting of barbells was never required in previous Cleveland Firefighter entry-level examinations.

58. The training instructors obtained a set of barbells in order to provide some training to the women for this event. In the week immediately prior to the actual examination, the women trained for the first time for this event. The women who did such training improved somewhat, but it was the opinion of Lieutenant McManamon that with additional training the women could have become more proficient with the barbells.

59. In 1983, 485 persons enrolled in the Don McNea Police and Fire School in preparation for the 1983 firefighter entry-level examination. Of the top 100 persons on the eligibility list, forty-eight were McNea students; of the top 200, ninety-two or ninety-three were McNea students, and out of the top 300, 134 were McNea students. Six of the nine women who took the McNea classes were on the eligibility list.

60. Don McNea based his curriculum on prior examinations and from the study guide prepared by Dr. Norman Henderson. These materials indicated to him that mechanical reasoning and technical subjects would be covered on the written component of the examination, including material found in the Ohio Fire Training Manual.

61. Basing its curriculum for the physical component of the course on Henderson's earlier tests, the McNea School's training included a dummy drag, a hose drag (a 2-1/2 inch hose), and a stair climb carrying a donut roll of hose. Weight lifting was recommended to develop biceps and forearms to enable candidates to carry the donut roll up 5 or 6 flights of

stairs.

62. The Civil Service Announcement, issued January 3, 1983, informed candidates that the written portion would measure basic reading and math skills, the ability to follow directions, the ability to recall basic factual materials, and a variety of judgment and reasoning skills related to firefighting performance. Candidates were also informed that the physical agility portion would measure endurance, upper and lower body strength, and hand/eye coordination. The announcement advised that candidates be required to perform a series of events using actual firefighting equipment and that such equipment may have to be carried up and down stairs; that they have to drag hoses; and that they would perform a simulated rescue with a dummy of adult body weight. Candidates were informed that prior physical fitness training to increase physical endurance was recommended to maximize performance on the examination.

63. On April 30, 1983, the City administered the written portion of the examination. The physical portion was administered between May 7 and May 13, 1983.

64. 3,612 persons applied to take the 1983 entry-level firefighter examination. 2,212 took the written test and 1,223 took the physical examination.

65. A composite score of 100 points was the maximum achievable score, with fifty points achievable for each portion.

66. In addition to the composite examination score, each candidate who was a qualifying veteran received five points pursuant to the City charter. Cleveland, Ohio, Charter, ch. 27, §74.

67. Each candidate who was a Cleveland resident at the time of application and who received a score of 69.5 or greater (composite test score plus veterans' points, if applicable) received 10 points pursuant to the City charter. Id. Most candidates received residency points and nearly every candidate who was hired in 1983 and 1985 received residency points.

68. Pursuant to instructions from the Civil Service Commission, the 1983 entry-level firefighter examination required that applicants complete the written portion of the examination successfully before taking the physical performance test.

69. The job of firefighter in the City of Cleveland requires certain cognitive abilities including reading comprehension, numerical skills, and various forms of reasoning.

70. The written examination included 120 questions divided into six sections. Dr. Henderson pre-tested all reading and math materials on four women and one man, each of whom was either a student or a relative of Dr. Henderson. Some of these same individuals also assisted in the development of test questions.

71. The first section of the written examination consisted of twenty questions which were based on study materials distributed at the beginning of the examination. The second section consisted of twenty-eight questions designed to test reading comprehension. The third section consisted of fifteen questions designed to test the candidates' ability to follow directions. The fourth section consisted of twenty-five mathematical questions, one of which was not graded. The fifth section consisted of eighteen questions designed to test judgment. The sixth section consisted of fourteen questions designed to test reasoning ability.

72. Although each question answered correctly on the written examination gave the candidate a half point, the scoring of the written examination involved the setting of a cap on maximum scores within each section of the examination. The capping of scores was used in the scoring of examination answer sheets of all candidates taking the written examination.

73. The examination answer sheets of candidates of certain minority groups were graded differently from those of other candidates, pursuant to the Headen Decree.

74. Candidates who had indicated on Civil Service Commission racial information forms, completed at the time they applied to take the 1983 entry level firefighter examination, that they were Black or of Hispanic background received certain additional points on the written examination, pursuant to the Headen Decree.

75. The passing score on the written examination was 35.00 for whites and 29.00 for minorities. These cutoffs were not based on possible job performance but only on whether the applicant could reasonably be expected to rank high

enough on the eligibility list to be considered for hiring.

76. Points were awarded to qualified veterans prior to their taking the written examination. Five points were added to the scores of veterans without regard to whether they received a passing score of 35.00 on their written examinations.

77. 285 women took the written portion of the 1983 entry-level firefighter examination and 122 women successfully completed it. 1,927 males took the written portion of the examination and 1,206 successfully completed it. Twenty-nine females were placed on the eligibility list but none ranked high enough to be hired during the two-year period within which the eligibility list is used.

78. The City was required by Court Order of January 17, 1977, to follow the Uniform Guidelines on Employee Selection, 29 C.F.R. §§1607, et seq. ("Uniform Guidelines"), with respect to future hirings for firefighters, Headen v. City of Cleveland, C733-330, slip opinion at 5. Dr. Henderson was also required by the City's RFP for the 1983 examination to follow the Uniform Guidelines.

79. Up to six points were added to the written score of male and female minority candidates who had not already earned full credit within the ceiling approach used for scoring. This was done in an effort to ensure that a sufficient number of minorities were available to take the physical portion of the examination in an attempt to comply with the minority preference provisions of the Headen Decree.

80. Hiring is done within race pursuant to the Headen Decree, thereby adding points to the written scores of male and female minority candidates and thus did not affect the validity of the 1983 examination.

81. The scoring of the written portion of the 1983 examination was as follows:

82. The physical component of the 1983 examination consisted of three events. In Event 1, using a barbell containing thirty-three pound weights, candidates were required to repeatedly lift the barbell overhead for one minute or until they reached the maximum of thirty-five lifts. In Event 2, while wearing a standard self-contained breathing apparatus tank, which had been individually fitted by fire personnel, a candidate was required to drag two lengths of standard 2-1/2 inch

hose a total of 180 feet (ninety feet in one direction, drop coupling, run to the other end of the hose, pick up and return ninety feet dropping the coupling in a designated area), run approximately seventy feet to a pumper, remove a one-person ladder (twelve feet and approximately thirty-five pounds) from the side of the pumper, carry the ladder into the fire tower, place the ladder against the back wall of the first landing which was marked with a sign, and continue up the inside stairwell to the fifth floor where a monitor observed that the candidate reached this point. The applicant then returned to the first landing, retrieved the ladder and placed it on the pumper. A candidate's score was based on the time required to complete the entire event. All candidates were given verbal instructions concerning the procedures to be followed, including the proper way to direct the hose over their shoulder to maximize their pulling capacity. In Event 3, applicants, also wearing the self-contained breathing apparatus tank, were required to drag a bag weighing 100 pounds seventy feet, including forty feet of low headroom area (thirty-eight inches high), turn and return to the starting point. The time to complete this event was used as a basis for establishing performance score.

83. The Training Academy provided instruction with respect to subjects on which the applicants were examined in the written component of the 1983 entry-level firefighter test. Training in the Academy was based on the Ohio Fire Service Training Manual. This book was distributed to all cadets and the Academy has been using it since 1972.

84. Instructors at the Training Academy instruct the cadets, in using a pike pole, to bend their knees. The barbell lift was meant to simulate the use of pike poles in tearing ceilings. Directions for this physical event required candidates to perform the lifts with their legs straight.

85. The probability that only one woman would achieve a score high enough to be placed on the eligibility list to be unrelated to sex is one in 5,000.

86. The scoring of the physical portion of the 1983 examination was as follows:

Event 1 (Barbell Lift)
Ceiling - 35 lifts
Score = (10 x no. of lifts)/35
Maximum points - 10
Event 2 (Hose Drag and Tower Climb)
Ceiling - 95 seconds
Score = (195 sec. - applicant's time)/4 More than 175 sec. but less than 5 min. = 5 pts. More than 5 min. = O pts.
Maximum points - 25
Event 3 (Dummy Drag)
Ceiling - 30 seconds
Score = (90 sec. - applicant's time)/4 More than 76 sec. but less than 5 min. = 4 pts. More than 5 min. = O pts.
Maximum points - 15

87. Up to 1.75 points were added to the physical agility scores of females who had not already earned the full credit on the barbell event (Event No. I) to adjust for lack of familiarity with barbells. The effect was to reduce male/female differences on the barbell event to less than one (I) point.

88. The most critical aspects of firefighting occur during the initial few minutes after arrival at the fire and whenever rescue is being performed. The physical abilities necessary for successful performance of the most critical aspects of firefighting include strength, both upper body and lower body, and speed. Strength is important for the successful performance of many firefighting tasks.

89. One critical aspect of firefighting is the provision of a continuous supply of water.

90. This activity is generally performed in a non-highrise structural fire by having a single firefighter drag a supply hose from a pumper a distance which may exceed 180 feet and coupling the hose to the hydrant within a short enough time that the pump operator can begin supplying water to the attack lines before the on-board water in the pumper is exhausted.

91. Firefighting is a very labor intensive job.

92. It is common for firefighters to take ladders off a pumper and carry them up steps.

93. It is common for firefighters to have to climb several flights of stairs wearing air tanks. This must be done with speed particularly in the contexts of a rescue or when locating and

accessing a water supply (stand pipe) in a high rise structure.

94. Numerous critical and important firefighting tasks require significant levels of upper body strength including, among others, operating the jaws-of-life, operating a K-12 saw (a power saw with a very high torque), removing ladders from apparatus, raising ladders, using a pike pole to tear ceilings, chasing fire or looking for hidden fire, operation of an ax to chop roofs for ventilation or to open walls to chase fire or look for hidden fire, carrying a multitude of heavy equipment, hanging ventilation fans, carrying ladders, using ladders as a tool to break second-story windows for ventilation, using axes or other tools to break windows for ventilation while keeping a leg lock on a ladder.

95. Many firefighting tasks involve substantial upper body strength, involving lifting and/or working overhead with heavy objects.

96. The greater the aerobic capacity of a firefighter, the longer the firefighter will be able to sustain activity without rest.

97. It is the City's practice to dispatch a sufficient number of firefighters so that fresh firefighters can replace those who are exhausted, providing a period of rest and recovery.

98. The physical agility portion of the 1983 test was a reasonable measure of the physical abilities necessary for successful performance of firefighting, particularly its most critical aspects.

99. Event No. 1 tests the elbow extenders and shoulder flexors and the requisite strength to lift and/or work with heavy objects overhead. Lifting and working with heavy objects overhead is an important job behavior.

100. The prohibition against bending knees during the performance of Event No. 1 was necessary in order to isolate for testing the muscle groups involved in lifting overhead.

101. Event No. 2 is principally a power event involving leg power and back strength. Tasks performed in Event No. 2 are representative of critical firefighting tasks frequently performed in situations where speed is the principal concern.

102. Event No. 3 assesses the strength and power and muscles required to perform dragging type action including, amongst others, rescue. The event simulates the critical firefighting task of rescuing a disabled adult when smoke and/

or heat necessitate the use of low drag.

103. There are significant gender differences with respect to physical abilities. Males greatly exceed females in upper body strength, leg strength, and aerobic capacity.

104. In terms of upper body strength, the difference between males and females is approximately two to one. In terms of lower body strength, females have approximately 75% of the lower body strength of males. In terms of overlap, generally only the top 15% of the females overlap the bottom 15% of males in terms of upper body strength. with respect to lower body strength, that is leg strength, there is a 35% overlap between upper females and lower males. The upper 25% of females overlap the lower 25% of males in terms of relative aerobic capacity.

105. Another critical aspect of firefighting is ventilation. One common form of ventilation requires chopping holes in the roof of a structure.

106. Roof chopping requires removing and raising of a wall ladder against the structure, carrying and eventual pushing up of a roof ladder onto the roof, ascending the roof by climbing the roof ladder while carrying axes, and chopping holes in the roof with axes, frequently while straddling the peak of the roof.

107. The entire process of ventilating a roof must be accomplished within approximately five minutes.

108. Failure to quickly perform activities, such as providing a continuous supply of water and ventilation, increases the risk of injury to firefighters, delays extinguishment efforts, increases fire spread, and delays victim rescue efforts.

109. Another critical aspect of firefighting is the rescue of unconscious or otherwise disabled victims. It is common for a single firefighter to conduct the rescue of an adult victim. It is very common for the firefighter to drag the victim while assuming a low crawl position. Strength and speed are essential to successful performance of this activity.

110. There is no typical fire or typical series of activities performed during firefighting.

111. A job-related test for firefighting does not require that representative tasks be performed in any particular sequence.

112. The validation studies prepared by Dr. Henderson,

including his ratings on the relationship between the abilities identified as necessary for the job and the task and the relationship between the abilities identified and the test were not prepared prior to or at the time of the development of the test. Instead, they were only prepared after the start of this litigation. The technical studies underlying Dr. Henderson's attempts at validating both the written and physical components of the examination were completed sometime in 1986, long after the examination was administered and graded.

113. The ratings relating the abilities identified as necessary for firefighting to both the specific tasks of the job and the test, which is an important part of the job analysis, are studies that should be prepared as a test is being developed in order to insure that the test is job related.

114. The maximum attainable score for candidates on the physical portion of the 1983 entry-level firefighter examination was 50.00. 35.00 was considered a passing score. Of the 1,125 men taking the physical test, 1,002 passed. Of the101 women taking the physical test, 15 passed.

115. Dr. Henderson included the barbell lift to measure absolute muscular endurance of shoulder and upper limbs.

116. This event did not allow use of the lower body, as applicants had to lock their legs.

117. Event No. 3, the dummy drag, was designed to be a content valid item by demonstrating the drag rescue of a victim from a smoke-filled room.

118. The Court finds that the 1983 physical performance examination puts a premium on speed and is primarily a test of anaerobic, rather than aerobic, capacity.

119. The Court finds that the 1983 physical performance examination is content valid.

120. A concurrent criterion study was conducted of the 1983 examination using a pool of 113 firefighters hired from the 1980 examination.

121. A sub-sample of 61 firefighters was also given the Harvard step test. The Harvard step test is a measure of submaximal aerobic capacity and is commonly used in screening and for research. The results of the Harvard step test were then correlated with scores on the physical ability component of the examination. Results revealed a within race correlation

between the Harvard step test and the physical ability component of .39. When this correlation was corrected for range restriction, that is, comparing it to the applicant pool and reliability of the step-up test, the estimated true correlation between the fitness scores on the Harvard step-up test and the physical ability scores was .55, with a standard error of .09. This indicated that the 1983 examination reflected a relatively high degree of general cardio-vascular fitness.

122. The correlation between the 1983 entry-level examination scores and job ratings in terms of overall performance criteria was as follows: For average job rating, correlation for the total test was .42; for percentile ranking, correlation was .45; for career rescue estimates, the correlation was .45; for dollar value of work, the correlation was .46; and for productivity, the correlation was .42. All these correlations are highly statistically significant and are well beyond the demands of the Uniform Guidelines.

123. Correlation coefficients of .3 or greater are considered high by industrial psychologists.

124. The concurrent validation study of the 1983 examination revealed that firefighters scoring highest on the 1983 examination also had the highest job ratings. Those scoring an average of ninety-one points on the 1983 examination had higher job ratings than those scoring average points of eighty-two and further higher job ratings than those with average points of sixty-nine.

125. The 1983 entry level firefighter examinations predicted job performance.

126. The addition of a direct assessment of aerobic fitness to the city's selection process would not result in less adverse impact upon the selection rate of females.

127. The alternative scoring mechanisms advanced by plaintiffs would not result in less adverse impact upon the selection rate of females.

128. Speed and strength, not aerobic capacity, are the distinguishing physical abilities necessary for successful firefighting during the first moments of arrival at a fire scene when matters of life and death and the extent of property damage are critical.

129. The content of the 1983 entrance examinations is

representative of important aspects of performance of the job of firefighting.

130. The 1983 examination measures the degree to which candidates have characteristics which are important for successful job performance.

131. There is a statistically significant relationship between scores on the 1983 examination and job performance.

132. For the same reason, the plaintiffs challenge to the criterion study for the 1983 examination is unpersuasive. Additionally, plaintiffs have failed to establish that the sample of 113 firefighters used in the study was nonrepresentative of the full population of over 900 Cleveland firefighters.

133. The policy of the City respecting the selection of firefighters is that the testing procedures identify those candidates best able to protect the health, safety and welfare of the citizens of Cleveland and that it is fair without arbitrarily excluding women from selection.

134. Dr. Henderson's arbitrarily adding points to scores based on race and sex without a mandate from the City of Cleveland or the courts is not in accord with professionally accepted standards.

135. An eligibility list was certified by the Civil Service Commission on May 19, 1983 and included the names of 1,098 successful candidates.

136. The eligibility list established after administration of the 1983 entry-level firefighter examination included the names of 1,069 men and 29 women. The woman with the highest score, Frances Hansen, was number 334 on the list of eligibles.

137. Because of their scores on the entry-level firefighter examinations, no women were hired by the Fire Department in 1983.

138. Notwithstanding his or her position on the eligibility list, each individual who appears on the eligibility list possesses the necessary cognitive and physical abilities to be a Cleveland firefighter.

139. The 1983 entry-level firefighter examination has been demonstrated to be valid using a criterion related strategy.

140. The 1983 entry-level firefighter examination has

been validated using a construct validity strategy.

141. Women were not treated adversely in terms of the opportunity to apply and take the 1983 entry-level firefighter examination.

142. The 1980 entry-level firefighter examination had an adverse impact upon the employment opportunities for women.

143. On April 22, 1985, the City hired seventy-five firefighters, sixty-five of whom were males and ten were females. But for this Court's Order dated March 20, 1985, no females would have been hired.

144. The lowest non-minority male hired on April 22, 1985 was ranked number 107. The lowest minority male was ranked number 215.

145. Females hired in 1985 pursuant to this Court's order were ranked numbers 334, 631, 837, 940, 950, 952, 987, 1,039, 1,093 and 1,097 on the eligibility list.

146. Candidates possessing higher levels of cognitive skills, strength and speed are likely to better perform the job of firefighting.

147. Higher scores on the examination are likely to result in better performance of the job of firefighting.

148. Firefighters scoring higher on the examination are likely to be more productive than firefighters scoring lower.

149. A validation study was conducted of the 1980 examination. Supervisor ratings for 277 firefighters were compared with scores of those same firefighters on the 1980 examination. The results showed that those firefighters who scored highest on the examination received higher supervisor performance ratings.

150. Based on any of the three accepted statistical measurements to determine disparate impact, binomial probabilities, chi square analyses or the fourth/fifth's rule, the 1983 entry-level firefighter written test had a disparate impact on women applicants.

151. The percentage of males passing the written examination was 62.5%. The percentage of females passing the written examination was 42.8%. A comparison of the two percentages indicates that the pass rate for females was only 50.64% of the pass rate for males. This pass rate satisfies the

Uniform Guidelines' definition of adverse impact.

152. Of the 1,328 people passing the written examination, 122 were female. Given the representation of women in the applicant pool—12.8%—the probability of having that few women pass the examination is significantly lower than by chance.

153. In 1983, 1,223 applicants took the physical performance examination, of whom 1,122 or 91.7% were male and 101 or 8.3% were female.

154. 1,069 or 89.3% of the males achieved a combined score on the written and physical performance examinations high enough to be included on the 1983 eligibility list. Twenty-nine or 28.7% of the females achieved a combined score high enough to be included on the 1983 eligibility list.

155. 1,002 or 89.3% of the males received a score of thirty-five or higher on the 1983 physical performance examination. Fifteen or 14.9% of the females received a score of thirty-five or higher on the 1983 physical performance examination.

156. The rate at which women received a combined written and physical score high enough to be placed upon the eligibility list was 30.2% of the rate at which men received a combined written and physical score high enough to be placed upon the eligibility list.

157. The rate of women scoring thirty-five or higher on the 1983 physical examination was 16.7% of the rate for men.

158. The physical performance component of the examination administered in 1983 had an adverse impact upon women.

159. In May of 1983, the City adopted an eligibility list.

160. Alternative scoring schemes provided by the plaintiffs demonstrate that the removal of minority points would not have resulted in the selection of any female within her race classification.

161. The eligibility list would have expired on May 19, 1985. However, pursuant to Order of this Court dated March 20, 1985, the list was extended until July 31, 1987.

162. On July 18, 1983, Cleveland hired thirty-five firefighters.

163. The highest female on the 1983 eligibility list is

ranked number 334 and is a non-minority. The highest minority female is ranked number 778.

164. The probability that only one woman would achieve a score high enough to be placed on the eligibility list to be unrelated to sex is one in 5,000.

CONCLUSIONS OF LAW

1. Title VII is concerned with discrimination in hiring and promotion, not merely discrimination in testing and test results. There must be a direct relationship between testing and test results and hiring and promotion. Tests that are designed whereby women applicants score lower than men, resulting in women being denied the opportunity and right to be hired, produce a disparate impact and are thus discriminatory. The adverse impact or discriminatory effect relates to a denial of job opportunities to women. The concern is discriminatory effect. It is not merely that women do not test as well as men that is important. Before the disparate impact can be considered discriminatory the differential in test scores must result in women being denied the opportunity to be hired in a pattern significantly the same as the pool of applicants.

2. To establish a prima facie case of a pattern or practice of discrimination under 2000e(6), the plaintiff must show by a preponderance of the evidence that the discrimination was the defendant's "standard operating procedure"; that is, the "regular rather than the unusual practice." Teamsters v. United States, 431 U.S. 324, 336 (1977). The evidence must show, or allow the court to draw an inference of, the employer's intent to discriminate against a particular group protected by Title VII.

3. Once a prima facie case of pattern or practice discrimination is established by the plaintiff, the burden then shifts to the defendant to show either that the plaintiff's statistical evidence is inaccurate or misleading or that there was a legitimate nondiscriminatory reason for the disparity. Hazelwood School District v. United States, 433 U.S. 299, 305 n. 9 (1977).

4. After a prima facie case has been established, it becomes incumbent upon the defendant to show that its employment practice, which results in the statistical disparity, is a result of some bona fide occupational qualification which is

reasonably necessary to the safe operation of the business. Dothard v. Rawlinson, 433 U.S. 321, 329 (1977).

5. If a plaintiff in a Title VII case proves a prima facie case of disparate impact, the employment practice is presumed discriminatory unless the defendant justifies its conduct. Adverse impact means that there is a substantially different rate of selection, hiring, promotion or other employment decisions which works to the disadvantage of members of a race, sex, or ethnic group. Disparate impact means that the impact of the test is unequal. Disparate impact means, for purposes of an employment discrimination suit, those employment practices which are neutral on their face but result in a comparatively harsh impact on one group, not justified by business necessity. In such a case, proof of discriminatory motive is not required and the plaintiff must show only that facially neutral standards select applicants in a significantly discriminatory pattern. Id. In other words, the plaintiff must show that the defendant's employment practices, although facially neutral in their treatment of different groups, in fact, fall more harshly on one group than another and cannot be justified by business necessity.

Discrimination means unfair treatment or denial of normal privileges to persons because of their race, age, nationality, or religion. In other words, discrimination is a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored.

6. The differential selection rate of males versus females for the job of firefighter in the City constitutes adverse impact.

7. "Two theories are available to a plaintiff under current law to prove a case of unlawful discrimination [under Title VII of the 1964 Civil Rights Act]: disparate treatment and disparate impact." Rowe v. Cleveland Pneumatic Co. v. Numerical Control, 690 F.2d 88, 92 (6th Cir. 1982).

8. An employer violates Title VII if it bases its selection decisions on procedures which have an adverse impact on women in opportunities to be selected, unless the employer can show that the use of the procedures validly predicts successful job performance. Connecticut v. Teal, 457 U.S. 440, 451 (1982); Dothard, 433 U.S. at 329; Albemarle Paper Co. v.

Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971); Harless v. Duck, 619 F.2d 611, 616 n. 6 (6th Cir. 1980); Guardians Association v. Civil Service Commission, 630 F.2d 79, 88 (2d Cir. 1980), cert. denied, 452 U.S. 940 (1980); Brunet v. City of Columbus, 642 F. Supp. 1214, 1245 (S.D. Ohio 1986), appeal dismissed, 826 F.2d 1062 (6th Cir. 1987).

9. Proof of disparate impact requires the plaintiff to prove the disparate impact of the selection device, after which the burden of proof shifts to the defendant to demonstrate that the selection device is required by business necessity. In the event that the defendant succeeds in meeting its burden, the burden of proof then returns to the plaintiff to demonstrate pretext. This is done by demonstrating that a less restrictive alternative test exists, and that the defendant was using the original test as a pretext for discrimination. Teal, 457 U.S. at 446-47; Dothard, 433 U.S. at 312, 329; Albermarle, 422 U.S. at 425; Harless, 619 F.2d at 616 n. 6; Brunet, 642 F. Supp. at 1245.

10. Once it has been shown that a test or other selection procedure has a discriminatory impact on the selection of women, the defendant has the burden of showing that the selection procedure was a business necessity and has been validated in accordance with accepted standards of the psychological profession. Albermarle, 422 U.S. at 431; Harless, 619 F.2d at 616, n. 6; Brunet, 642 F. Supp. at 1221, 1230.

11. Only after the defendant proves that the test was validated, is job related, and is not discriminatory are the plaintiffs put to their burden of rebuttal.

In the rebuttal stage, the plaintiffs must prove pretext. First, the plaintiffs must prove that the test is in fact not job related and thus discriminatory. Second, the plaintiffs may show that there is an alternative test that is equally job related and result in less adverse impact on women applicants than the test at issue. In cases where some women or other minorities are being hired, the alternative job related test should result in more women or minorities being hired. Under these circumstances, courts would then hold that the plaintiff has shown pretext and that, while the test at issue may still be job related, it is discriminatory and thus invalid.

Because no women have placed high enough on the eligibility list to be hired, the plaintiffs, in the present action, must show more in their rebuttal case than if any women had been hired. Based on the evidence adduced at trial, women applicants rank so low that none ranked high enough on the eligibility list to be hired.

It is not sufficient for the plaintiffs, on rebuttal, to show only that the alternative test was job related and that women would do proportionately better on the alternative test than they did on the defendants' test. Rather, the plaintiffs must prove that the alternative test is job related and would result in a strong likelihood and probability that women applicants would rank high enough on the eligibility list to be considered for hiring. The mere fact that a job-related alternative test would only provide a lesser adverse impact on test scores is not a sufficient basis on which to nullify or declare invalid the defendants' test.

In the present case, the plaintiffs did not demonstrate that there was an alternative test that was as equally job related as the defendants' test and that would produce a lesser adverse impact on the hiring of women than the defendants' test. Further, the plaintiffs did not prove that an alternative job related test would increase the women's examination scores or would result in a strong probability or likelihood that women would place high enough on the eligibility list to be in a position to be hired.

12. The Supreme Court, the Uniform Guidelines, and the standards of the psychological profession, American Psychological Association, Standard for Educational and Psychological Testing (1985) ("APA Standards"), recognize three validation strategies: criterion-related validity, content validity, and construct validity. Uniform Guidelines, 29 C.F.R. +1607.5; APA Standards, p. 9; Washington v. Davis, 426 U.S. 229, 247 n. 13 (1976); Harless, 619 F.2d at 616, n. 5; Brunet, 642 F. Supp. at 1242; Principles for the Validation and Use of Personnel Selection Procedures, Division 14 of the American Psychological Association, p. 6 (September 8, 1986) ("Division 14 Principles").

13. Content validity is appropriate where the content of the test "closely approximates tasks to be performed on the

job." Washington, 426 U.S. at 247, n. 13; United States v. City of Chicago, 573 F.2d 416, 425 (7th Cir. 1978); Brunet, 642 F. Supp. at 1242. If the validity of a test which measures knowledge, skills or abilities is supported on the grounds of content validity the test must measure operationally defined knowledge, skills, or abilities that are prerequisites to successful job performance for critical tasks necessary to perform the job successfully. Uniform Guidelines, 29 C.F.R. §1607.14. Content validity is not an appropriate strategy for a selection procedure involving knowledge, skills or abilities which the employee will be expected to learn on the job.

14. Criterion-related validity requires empirical data demonstrating that the selection procedure is predictive of, or significantly correlated with, a criterion which represents an important work behavior, and that the correlations are practically significant. Ensley Branch of N.A.A.C.P. v. Seibels, 616 F.2d 812, 816, n. 11 (5th Cir. 1980), cert. denied, 449 U.S. 1061 (1980).

15. Construct validity requires the demonstration of a "relationship between underlying traits or 'hypothetical constructs' inferred from behavior and a set of test measures related to those constructs." Uniform Guidelines, 29 C.F.R. 1607.14(D), 1607.15(D).

16. The job of firefighter requires a high degree of skill and physical ability. The public interest clearly lies in having the most highly qualified person selected for the position of firefighter.

17. The risks to the public in terms of life, limb and property as a consequence of hiring an unqualified firefighter are great, resulting in a less heavy burden for demonstrating the job relatedness of the employment criteria. Spurlock v. United States Airline, Inc., 475 F.2d 216, 219 (lOth Cir. 1972); Davis v. City of Dallas, 777 F.2d 205, 211-13.

18. To justify hiring requirements as a business necessity, an employer must show that the challenged practice bears a manifest relationship to the employment at issue; i.e., that the practice is related to job performance. Teal, 457 U.S. at 446; Chrisne v. Complete Auto Transit, Inc., 645 F.2d 1251, 1259 (6th Cir. 1981).

19. The City has the burden of demonstrating that the

1983 written and physical components of the examination are valid and job related in accordance with standards of the psychological profession.

20. Because important aspects of the job analysis were not performed as the test was being developed, but were instead prepared in contemplation of litigation, the job analysis is suspect. Studies done post hoc in an attempt to validate a test already given are inherently suspect due to a danger of lack of objectivity. Albermarle, 422 U.S. at 433, n. 32. However, this fact alone does not require a finding that the validation procedures are invalid.

21. The defendant did meet its burden of demonstrating business necessity for the use of the 1983 firefighter entry-level written component of the examination. The City proved that the examination was developed, administered and scored in an acceptably professional manner consistent with the Uniform Guidelines, APA Standards, or Division 14 Principles.

22. The Uniform Guidelines require that a selection device having a disparate impact be operationally validated for the use to which it has been put, and that an employer must show ~~that a higher score . . . is likely to result in better job performance" in order for scores to be used in rank order. Uniform Guidelines, 29 C.F.R. + 1607. 14(C)(9).

23. The City has demonstrated that the 1983 entry-level firefighter examination adequately reflected the important aspects of the job of firefighting and that the 1983 test scores varied sufficiently with job performance to warrant rank-order hiring of firefighters.

24. The use of the results of the 1983 entry-level firefighter examination to rank order applicants is valid and job-related in that the evidence showed that a higher score on the physical components of the examination correlates to a more successful job performance.

25. The job relatedness and utility of the 1983 examination has been demonstrated to be strong enough to justify rank ordering.

26. The 1983 examination is content valid.

27. The 1983 examination is valid based upon construct validity.

28. The 1983 examination is valid based on criterion va-

lidity.

29. The City has met its burden of proving the 1983 examination to be a valid predictor of successful job performance.

30. The City has shown that the 1983 selection procedure taken either as a whole, or by its individual components, is valid for its intended use.

31. The scoring of the 1983 examination and the resulting eligibility list were proper mechanisms for selection of firefighters.

32. Cutoff scores can properly "be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force. Where applicants are ranked on the basis of properly validated selection procedures and those applicants scoring below a higher cutoff score than appropriate in light of such expectations have little or no chance of being selected for employment, the higher cutoff may be appropriate, but the degree of adverse impact should be considered." Uniform Guidelines, 29 C.F.R. § 1607.5(H).

33. The Uniform Guidelines should always be considered in determining the validity of a test, but they should not be regarded as conclusive evidence thereof unless reason and statutory interpretation support their conclusions.

34. The Uniform Guidelines are persuasive, but they are not law.

35. The raw scores used to establish the eligibility lists generated from the 1983 entry-level firefighter examination were valid because they were based on evidence that the scores are predictive of successful job performance.

36. The weighing of the written and physical components of the 1983 entry-level firefighter examination was valid and job-related.

37. The City does not have a policy of denying females equal opportunity of employment as firefighters within the Fire Department.

38. The 1983 firefighter entry-level examination was not designed to discriminate against females.

39. A specific measurement of stamina or aerobic capacity is not required in order for a firefighter examination to be valid and not vulnerable to a Title VII challenge. Berkman v.

City of New York, 812 F.2d 52, 59-60 (2nd Cir. 1987).

40. Both aerobic and anaerobic qualities are important to firefighters. Anaerobic qualities are more important than aerobic qualities. It is not necessary that an aerobic test be a part of the physical portion of the examination in order for the examination to be valid and job related. Aerobic qualities may be tested independently by a step test, stress test, or other similar activity. This may be a part of the medical examination. In any event, aerobics should be tested before a person is placed on the eligibility list. The failure to have the aerobics as a portion of the physical examination process does not invalidate the examination. It may be given after the written and physical portions of the examination.

41. A decision by the City to adopt an affirmative action plan that would provide for a dual list of men and women for entry-level firefighters and which would provide for a number of women to be hired as entry-level firefighters is an administrative and policy decision and is not a legal requirement. Whether the City uses a rank-order system or a pass/fail system with random selection is an administrative and policy decision and is not a legal requirement.

42. Plaintiffs failed to establish the existence of an alternative selection device which has comparable utility as the 1983 examination, and would have a less adverse impact on either test scores or the hiring rate of women.

43. Plaintiffs have failed to prove the existence of a selection procedure of equal validity which would have a less adverse impact upon the selection rate of females.

44. The City has shown that the 1983 firefighter examination is valid for its intended use. Accordingly, an order to that effect will be entered.

45. The plaintiff, United States Government, in the pattern or practice case proved in its prima facie case that there was a disparate impact. The defendant proved that its test was job related and not discriminatory. The plaintiffs did not prove pretext which would nullify or require a declaration that the defendant's test was discriminatory and not valid. The plaintiffs did not demonstrate that there was an alternative job related test that would result in the probability of women ranking high enough to be considered for employment as entry-level fire-

fighters.

46. In Case No. C83-2484, the plaintiffs did not prove that the defendant discriminated against women applicants for entry-level firefighters. Plaintiffs failed to prove that the 1983 entry-level written and/or physical examination was not job related. Plaintiffs failed to prove that the 1983 entry-level written and/or physical examination was discriminatory against women.

47. In Case No. C83-4998, the plaintiffs failed to prove that the defendant engaged in a pattern and practice of discrimination against women applicants for entry-level firefighters. The plaintiffs failed to prove that the 1983 entry-level written and/or physical examination for entry-level firefighters was not job related. Plaintiffs failed to prove that the 1983 entry-level written and/or physical examination for firefighters was discriminatory against women.

CONCLUSION

1. Cities should be aware of the teachings of Brunet, Berkman, and the present action.

2. Cities should design and administer firefighter entry-level examinations that are job related and are not discriminatory against women.

3. In the area of validation, the cities should validate their examinations, both written and physical, as soon as possible. Ideally, validation should be done after the test is designed and before it is given. This is not feasible because of the security of the examination. This validation system is done by administering the test to a number of current firefighters. Their test results are compared with their training academy records and their on-the-job performance ratings and other experiences. It is not ideal because the present firefighters do not always take the test seriously. Also, performance ratings are very subjective. While this is not the ideal method, it is the best available method.

4. Some cities use rank-order hiring and other use a pass/fail method coupled with random selection hiring from the list of those passing the examination. If municipalities want to continue to use rank-order hiring, they may do so but they should be made aware of the fact that rank-order hiring is coming under increasing attack. For those using rank-order

hiring, cities must make sure that they can demonstrate that there is a probability that those with the higher rank would be better firefighters than those with the lower rank. If this cannot be demonstrated, it will be argued that rank order is not a valid method of hiring and thus is discriminatory.

5. If cities are serious about wanting to hire the best qualified persons for firefighters and still hire women firefighters, they must engage in long-range, meaningful recruitment and training programs to get women interested in becoming firefighters and to train them for firefighting tasks. A mere announcement of policies stating that a city will not discriminate against women in hiring firefighters is not enough. Cities know, or should know, that if they want the best qualified firefighters and use a rank-order system, very few, if any, women will qualify at the present time and will not be hired in any significant number because they generally cannot compete with men physically.

6. For those women interested in becoming firefighters, they must know and understand what is necessary to become firefighters and they must train accordingly.

7. During the trial of this case, this Court was inundated with statistics and opinions of experts, including statisticians, industrial psychologists, and exercise physiologists, as well as the opinions of unsuccessful applicants for firefighting positions and present firefighters. The written and physical components of the examination were designed, came under attack, and then were validated. This Court believes, after reading all of the reported cases on the subject, listening to all of the witnesses, and reviewing all of the exhibits, that any entry-level examination can be attacked and conclusions reached by witnesses that the examination has an adverse impact, is not job related, and is discriminatory. The courts are faced with picking and choosing from the testimony and exhibits of the various experts. This procedure is not an exact science, and it appears to this Court that any and all tests can be subject to attack, with some credible evidence.

8. In May of 1985, during the pendency of this action the City desired to hire some additional firefighters. This Court used its persuasive powers and was instrumental in getting the City to agree to hire ten women firefighters, the first women

firefighters in the City's history. The experiences of these women over the last several years should go a long way in helping the cause of women who want to become firefighters. Their test scores in the written and physical components of the examination administered in 1983, together with their academy training records, job evaluations and experiences should prove helpful.

Based on the foregoing, the Court shall enter judgment for the defendant, City of Cleveland, and against the plaintiffs in Case No. C83-2484.

The Court shall enter judgment for the defendant, City of Cleveland, and against the plaintiff, United States of America, in Case No. C83-4998.

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UNITED STATES DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

BARBARA ZAMLEN, et al.,	) A. I. KRENZLER
	) JUDGE
Plaintiff	)
	)
-vs-	) CASE NO.
	) C83-2484
CITY OF CLEVELAND, et al.,	)
	)
Defendants	)
	)
UNITED STATES OF AMERICA	)
	)
Plaintiff	) CASE NO.
-vs-	) C83-4998
	)
CITY OF CLEVELAND, et al.,	) JUDGMENT ENTRY
	)
Defendants	)

The Court, having issued its Memorandum of Opinion and Findings of Fact and Conclusions of Law, enters judgment as follows.

(I) Judgment for the defendant City of Cleveland and against the plaintiffs in Case No. C83-2484.

(2) Judgment for defendant City of Cleveland and against the plaintiff in Case No. C83-4998.

Plaintiffs to pay costs in the respective cases.

IT IS SO ORDERED.

_____
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
F I L E D
FEB 27 1991
OFFICE OF THE CLERK

NO. 90-1046

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

TO BE REPRINTED

BARBARA ZAMLEN, et al.,

Petitioners,

v.

CITY OF CLEVELAND, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS CITY OF CLEVELAND, ET AL.

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BARBARA ZAMLEN, et al.,

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vs.

CITY OF CLEVELAND, et al.,

Respondents.

BRIEF IN OPPOSITION FOR RESPONDENTS
CITY OF CLEVELAND, ET AL.

COUNTER STATEMENT OF THE QUESTIONS PRESENTED

1. Whether Seventh Amendment rights are abrogated when a district court grants a motion for directed verdict at the close of plaintiffs' case as to a claim of sex discrimination brought under 42 U.S.C. §1983, where plaintiffs' statistical evidence was insufficient to demonstrate intentional discrimination.

2. Whether the appeals court properly applied Wards Cove, when it determined that the defendants in a Title VII case met their burden of producing evidence justifying the use of the selection device.

COUNTER STATEMENT OF THE CASE

On June 1, 1983, this action was filed by Barbara Zamlen, Charlene Cuffari, Sharon Pirosko, Leana Adkins, Jennifer Garuccio, Concetta K. Zingale, Diane Horne and Denise Campbell ("Petitioners"). The action was brought on behalf of the named plaintiffs and the class consisting of all women who took the 1983 entry-level firefighter examination for the City of Cleveland ("City").

Named as defendants were the City of Cleveland; George V. Voinovich, Mayor; Reginald M. Turner, Director of the Department of Public Safety; Thomas Skulina, President of the Civil Service Commission; Edmund J. Turk, Vice President of the Civil Service Commission; Irene M. Morrow, Secretary

of the Civil Service Commission, Nancy Oliver and Solomon Harge, Civil Service Commission members; Karl Schneider, Personnel Administrator for the Civil Service Commission; James J. McNamee, Fire Chief for the City;[1] and Dr. Norman D. Henderson, a psychologist and expert in personnel testing and statistical analyses ("Dr. Henderson"). Dr. Henderson, by contract with the City, developed the 1983 entry-level firefighter examination ("1983 examination"). The individual defendants were sued in both their individual and official capacities.

Plaintiffs' action contained four counts:

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[1]Municipal defendants will be referred to hereinafter as "Respondents."

1. Count One alleged that both the physical and written components of the 1983 examination had an adverse impact on female applicants and were discriminatory in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, et seq. ("Title VII").

2. Count Two alleged violation of 42 U.S.C. §1983 ("§1983") as a result of violations of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

3. Count Three alleged a conspiracy among the defendants, pursuant to 42 U.S.C. §1985(3) ("§1985"), to deprive plaintiffs of their due process and equal protection rights under the Fourteenth Amendment.

4. Count Four alleged that defendants committed fraud by violating Ohio Rev. Code §124.58 and thus defeating, deceiving or obstructing plaintiffs' rights of examination, appointment or employment.

As relief, petitioners sought injunctive relief, backpay, prejudgment

and post-judgment interest, costs, attorneys' fees and such other permanent relief as the district court deemed proper.

An answer was filed on behalf of respondents denying the principal allegations and setting forth affirmative defenses. Principal among the defenses was the position that the 1983 examination was job-related and predictive of job performance. Dr. Henderson filed an answer denying the principal allegations and also asserting as an affirmative defense the fact that the test he administered was job-related.

Subsequently, on December 14, 1983, the United States of America ("United States") commenced Case No. C83-4998 against the City, Civil Service Commission, Cleveland Fire Department, and in their official capacities,

Director Turner, Chief McNamee, Skulina, Turk, Morrow, Oliver and Harge.

Brought under §707 of the Civil Rights Act of 1964, 42 U.S.C. §2000e-6(a), the United States' action alleged that the named defendants were responsible for establishing terms, conditions and other practices which bear upon employment of firefighters in the City. The complaint set forth that of the approximately 961 persons employed as firefighters, none was a female. The United States contended that the named defendants pursued policies or practices which discriminate against females and which deprive them of employment opportunities based on their sex. It was further alleged that defendants failed to utilize selection procedures which do not have an adverse impact on females and which are

valid predictors of successful job performance. As relief, the United States sought injunctive relief to halt the alleged discrimination. Respondents filed an answer denying the allegations and raising the same affirmative defenses as in the class action.

The district court denied motions to dismiss which were filed by both the respondents and Dr. Henderson.

In 1983, the City appointed 35 firefighters from the eligible list generated by the 1983 examination. Selection was made on a rank-ordered (top-down) basis. There were no females at the top of the list. On December 21, 1983, the district court granted petitioners' motion for preliminary injunction barring the City from making any further appointments from the eligible list until so ordered by the

court. Approximately one year later, the need arose to appoint additional firefighters. On January 2, 1985, the City filed a Motion for Limited Relief from the Preliminary Injunction. Thereafter, on March 20, 1985, the district court issued the Interim Order Dissolving the Preliminary Injunction. Included in that order were provisions for appointing females as cadets for the next Fire Training Academy class.

On January 30, 1986, the court issued an order certifying the class in this case as all females who unsuccessfully sought firefighter positions from the 1983 examination and all future female applicants. Upon motion of petitioners and the United States, the two cases were consolidated for trial.

Prior to trial, claims against Dr. Henderson were severed from those against the municipal defendants for the purpose of trial. Petitioners also dismissed their §1985 action prior to the start of trial.

Trial of the consolidated cases began on April 6, 1987 before a jury. Testimony was taken for four weeks. Title VII claims were tried to the court while claims under §1983 and the pendent state action were tried to the jury. At the close of the case of petitioners and the United States, respondents moved for directed verdict as to all counts. The district court granted the motion as to the §1983 claim and the pendent state claim for fraud. All individuals named as defendants were likewise dismissed. The trial then proceeded as to the Title VII claims of both the petitioners and

the United States. Closing arguments were held on May 18, 1987.

On May 27, 1988, the district court issued a 69-page Memorandum of Opinion, and Findings of Fact and Conclusion of Law. Appendix, 22A.[2] The court found for respondents. Petitioners filed their notice of appeal to the Sixth Circuit on June 24, 1988. The United States' notice of appeal, filed on July 27, 1988 was dismissed by the appeals court as untimely.

On June 11, 1990, the Sixth Circuit Court of Appeals issued its Opinion affirming the district court's ruling. Petitioners' request for rehearing en banc was denied by the appeals court.

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[2]References to the "Appendix" refer to petitioners' "Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit" which has been filed with this Court.

FACTS

Respondents adopt as their statement of the facts the description of the case as outlined in the opinion of the Sixth Circuit Court of Appeals, Appendix 4A-8A.

REASONS FOR DENYING THE WRIT

1. Seventh Amendment rights are not abrogated when a district court grants a motion for directed verdict at the close of plaintiffs' case as to a claim of sex discrimination brought under 42 U.S.C. §1983, where plaintiffs' statistical evidence was insufficient to demonstrate intentional discrimination.

2. The Sixth Circuit Court of Appeals properly applied Wards Cove when it determined that the defendants in a Title VII case met their burden of producing evidence justifying the use of the selection device.

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I. Seventh Amendment rights are not abrogated when a district court grants a motion for directed verdict at the close of plaintiffs' case as to a claim of sex discrimination brought under 42 U.S.C. §1983, where plaintiffs' statistical evidence was insufficient to demonstrate intentional discrimination.

Petitioners erroneously apply the holding of Lytle v. Household Manufacturing, Inc., ___ U.S. ___, 110 S.Ct. 1331 (1990) to the appeals court's grant of directed verdict in this case. Petitioners attempt to equate the dismissal in error of claims under 42 U.S.C.A. §1981 in Lytle with the directed verdict granted in this case, since in both cases, the jury was not allowed to decide the legal claims.

The fallacy of this argument is borne out upon examination of the differences in these cases. In

Lytle, the district court erroneously determined "that Title VII provided the exclusive remedy" for employment discrimination injuries. 110 S.Ct. at 1335. The court of appeals affirmed the dismissal, yet noted that claims brought under §1981 and Title VII are separate and distinct. Nonetheless, the appeals court determined that since the district court found against the employee on the Title VII claims, the employee was collaterally estopped from litigating his §1981 claim since the elements of a §1981 cause of action were identical to those under Title VII.

On review, this Court reversed dismissal of the §1981 claims on the ground that equitable claims do not collaterally estop legal claims on the same issue:

> When legal and equitable claims are joined in the same action, 'the right to jury trial on the legal claim, including all issues common to both claims, remains intact.' (Citing to Curtis v. Loether, 415 U.S. 1989, 196, n.11, 94 S.Ct. 1005, 1009, n.11, 39 L.Ed. 2d 260 (1974). 110 S.Ct. at 1335.

Thus, in Lytle, this Court found a violation of the right to trial by jury in "suits at common law" as guaranteed by the Seventh Amendment.

In contrast, the case sub judice does not involve the erroneous dismissal of legal claims on the false assumption that equitable claims preempted the field or collaterally estopped legal claims. Here, the district court, at the close of petitioners' case, granted respondents' motion for directed verdict. Petitioners were granted a jury trial as to claims brought under §1983, yet since the evidence was

insufficient to establish a prima facie claim of discrimination under §1983, a directed verdict was granted.

In noting the strong similarity between the "genuine issue" standard for summary judgment and the "reasonable jury" directed verdict standard, Justice White wrote in Lytle as follows:

> In essence, though, the inquiry under each is the same; whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.
>
> 110 S.Ct. at 251-252

This Court also stated in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) that "the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." Id. at 250. (Citing to Brady v. Southern R. Co., 320 U.S. 476, 479-480 (1943)).

Referring to Milstead v. International Brotherhood of Teamsters, 580 F.2d 232, 235 (6th Cir. 1978), cert. denied 454 U.S. 896 (1981), the Sixth Circuit wrote in Sawchik v. E.I. Dupont Denemours & Co., 783 F.2d 635 (6th Cir. 1989) as follows:

> In considering a motion for directed verdict under Rule 50(a), the trial court "must determine whether there was sufficient evidence presented to raise a material issue of fact for the jury." O'Neill v. Kiledjian, 511 F.2d 511, 513 (6th Cir. 1975). As applied in this context, "sufficient evidence" is such that, when viewed in the light of those inferences most favorable to the nonmovant, Galloway v. United States, 319 U.S. 372, 395, 63 S.Ct. 1077, 1089, 87 L.Ed. 1458 (1943), and Dowdell v. U.S. Industries, 495 F.2d 641, 643 (6th Cir. 1974), there is either a complete absence of proof on the issues or no controverted issues of fact upon which reasonable men could differ. Sulmeyer v. Coca-Cola Co., 515 F.2d 835, 841 (5th Cir. 1975), cert. denied 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 341

(1976), citing 5A Moore's Federal Practice ¶50.02[1] (2d ed. 1974). Appellate courts apply this same standard. O'Neill v. Kiledjian, supra, at 513, citing 9 Wright & Miller, Federal Practice and Procedure §2524, at 542 (1971).

In the instant case, the district court found and the court of appeals agreed that petitioners' statistical evidence was insufficient to demonstrate intentional discrimination under §1983. Directed verdict was therefore appropriately granted. While the Seventh Amendment authorizes trial by jury as to legal claims, it does not insulate a party from the possibility of directed verdict under Rule 50(a) of the Federal Rules of Civil Procedure. Petitioners would have this Court make Rule 50(a) a nullity by advancing that the Seventh Amendment requires that in all instances, legal claims should

ultimately be decided by a jury, irrespective of the weight of that evidence.

Petitioners were given several opportunities to offer evidence of intentional discrimination beyond the statistical evidence already presented. Petitioners, along with the United States, sought to "ambush" respondents during the rebuttal phase of the case by their expert testimony. In so doing, they put their §1983 claims at risk by refusing to heed the district court's strong admonitions that they may not survive a directed verdict. Petitioners assumed a known risk and cannot now claim foul.

II. The Sixth Circuit Court of Appeals properly applied Wards Cove when it determined that the defendants in a Title VII case met their burden of producing evidence justifying the use of the selection device.

Petitioners advance that guidance is needed from this Court as to the proper standard to apply in determining whether the defendant in a disparate impact case has met its burden of producing evidence of job-relatedness. Petitioners further ask this Court's guidance as to when that evidence has been rebutted.

This Court provided a definitive blueprint on burden of proof in a Title VII action when it decided Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642 (1989). The instant case presents no issue that should compel this Court to revisit burden of proof.

Petitioners correctly state that Wards Cove was decided while this case

was on appeal. When the Sixth Circuit ultimately ruled, though, it had the benefit of this Court's guidance in Wards Cove.[3] The appeals court properly determined that respondents' burden was one of only producing evidence to justify the selection device. Based on the status of the law at the time of trial, the district court had determined that after the plaintiff proved disparate impact, the burden of proof shifted "to the defendant to demonstrate that the selection device is required by business necessity." District court opinion, Appendix at page 56A.

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[3]In footnote 8 of their brief, petitioners erroneously stated that the Sixth Circuit indicated that the doctrine announced in Spurlock v. United Airline, Inc., 475 F.2d 216 (10th Cir. 1972) was no longer applicable. The appeals court merely stated that in light of Wards Cove, it "need not decide whether the Spurlock doctrine was properly invoked." See Appendix at page 16A.

The appeals court noted that in applying Spurlock and related cases, respondents' burden had been greater than that now required under Wards Cove. Consequently, having met the more onerous burden of pre-Wards Cove case law, respondents more than adequately met the Wards Cove standard. Even before Wards Cove, the law was established that the ultimate burden of persuading the trier of fact in a Title VII action rests at all times with the plaintiff. Watson v. Fort Worth Bank & Trust Co., 487 U.S. 977 (1988); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Contrary to petitioners' view, respondents' evidence on the validity and job-relatedness of the 1983 firefighter examination was not conclusively or even remotely rebutted

by petitioners. The appeals court noted that there was substantial evidence before the district court supporting the conclusion that the examination was properly validated. In response to that substantial body of evidence, petitioners merely offered testimony of alternative scoring methods, none of which would have resulted in the hiring of females or a reduction in adverse impact. Petitioners were unable to rebut the strong evidence of validity by offering a selection methodology with equal or similar utility and less adverse impact.

Finally, in a last desperate attempt to secure review by this Court, petitioners attempt to link the existence of the appeals court ruling with aspirations of women to become firefighters. Citing to Berkman v. City

of New York, 812 F.2d 52 (2d Cir.), cert. denied, 108 S.Ct. 146 (1987), petitioners strongly imply that the Sixth Circuit's ruling will forever bar women from the ranks of firefighters. Such is not the case.

As one of respondents' expert testified, it is the job of firefighting that discriminates, not the test. Dr. Theus Doolittle, an exercise physiologist, testified that because firefighting is labor intensive, it will always exclude from its ranks those who are smaller and weaker. Size and morphology, and not sex are the deciding factors. Females, as well as males, who possess the physical and intellectual skills to perform the job of firefighter will be able to secure that position.

Thus, Dr. Henderson's test, which was validated on all three bases

identified in the Equal Employment Opportunity Commission's Uniform Guidelines on Employee Selection, 29 C.F.R. §1607 (content, construct and criterion-related validity), did not unlawfully trammel the aspirations of women seeking the job of firefighter. Nor will the appeals court's ruling, which appropriately upheld the district court's ruling.

Taken as a whole, petitioners offer no new arguments, nor raise any compelling federal constitutional or statutory issue to warrant granting their writ of certiorari.

CONCLUSION

For all the foregoing reasons, respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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